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THE LAW
OF
MARTIAL RULE

BY

CHARLES FAIRMAN

WILLIAMS COLLEGE

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FOREWORD

Like many other venerable controversies, the question whether or not "martial law" is known to the Anglo-American system of jurisprudence depends upon how the term is defined. Starting with the premise that it means "nothing more nor less than the will of the general," one can generate some heat in proving that it is incompatible with constitutional government. Yet of late years the words have come trippingly from the lips of a considerable number of judges, to say nothing of executive practice in many States. There seemed to be some need for a re-examination of the subject.

"Martial law" runs close to politics. On occasion it has set nations to arguing. It touches one's political philosophy, possibly one's prejudice. The term is anathema to those to whom executive power is as much suspect as it was in the days of the Stuarts. On the contrary, for those to whom the Constitution is a guarantee of the perpetuation of existing economic arrangements, "martial law" has a pleasurable connotation. It is sanctioned by a higher law which decrees that trouble-makers are to be suppressed with the utmost celerity. One may be doctrinaire in support of the one faith or the other. The author feels no mission to defend either creed, and in endeavoring to approach the subject objectively may incur the condemnation of both groups.

The editors of the American Political Science Review and of the Illinois Law Review have been so good as to consent to the incorporation into the text of excerpts from articles which originally appeared in their journals. Appreciative acknowledgment is made of a debt, now of six years' standing, to Professor H. A. Yeomans, for generous counsel when this study was first undertaken. The author is under obligation to Professor E. M. Morgan of the Harvard Law School for giving the manuscript in its final form the benefit of his examination. The opinions expressed are personal to the author.

CHARLES FAIRMAN

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LAW OF MARTIAL RULE

CHAPTER I

HISTORICAL BACKGROUND OF MARTIAL LAW

> For always preparatory to an actual war the kings of this realm, by advice of the constable, and marshal, were used to compose a book of rules and orders, for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law.
>
> Hale, History of the Common Law, 34.

"Researches in public law are often only the history of past abuses."[1] In the matter at hand this caution will be borne in mind. The attempt will be not merely to find what the law is and to trace its history, but also to inquire how it works and how it may be improved by intelligent effort. We must begin with what may seem to be of only antiquarian interest. For much present confusion is due to an uncritical reading of the old authorities. The indispensable historical introduction being accomplished, we may proceed to state the problem and seek its solution.

§ 1. The Court of the Constable and Marshal. Various systems of law coexisted in medieval England.

[1] A remark which Rousseau (Social Contract, I, c. 2) attributes to the Marquis d'Argenson's Traité des intérêts de la France.

Among these, in addition to the common law and equity, may be named the canon law, admiralty, and marshal law. Each of these rival jurisdictions had its own court or courts. Thus Hale speaks of the ecclesiastical courts and the court of admiralty and continues:

> the third court wherein the civil law [2] has had its use in this kingdom, is the military court, held before the constable and marshal anciently, as the Judices Ordinarii in this case; or otherwise before the king's commissioners of that jurisdiction, as Judices Delegati.[3]

Coke described it as "the fountain of marshal law." [4]

The jurisdiction of the court of the constable and marshal was both civil and criminal, and fell under several heads, as appears from the following passage in The Black Book of the Admiralty: [5]

> The Office of the Conestable and Mareschalle.
>
> In the time of werre is to punish all manner of men that breken the statutes and ordonnaunce by the kynge made to be keped in the oost [6] in the said tyme, and to punysh the same accordyng to the peynes provided in the said statutes. The conestable and mareschall hath knowleche upon all maner crymes, con-

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2 Arthur Duck, a civil lawyer who was king's advocate in this court, records that "the use and Authority of the Civil Law in this Court, is allow'd by all our Common Lawyers," and that "when the Constable and Marshal are otherwise employ'd . . . some . . . expert Civilian, is appointed to preside in this Court." De usu et auctoritate Juris Civilis, (English translation appended to Ferrière, The History of the Roman or Civil Law, London, 1724), xxxiv. To the same effect are Rushworth, Historical Collections, II, pt. 2, 1055, and Holdsworth, Hist. Eng. Law, IV, 238, 272; V, 15.

3 Hist. Com. Law, 33.

4 Fourth Inst., 123.

5 Rolls Series [55], I, 281.

6 The army.

> tracts, pleets, querelle, trespas, injuries, and offenses don beyonde the see in tyme of werre betwene souldeour and souldeour, bytwene merchaunts, vytelers, . . . and artificers necessary to the oost, and yf any of the personnes be oone[7] and the other person be a straunger, the conestable and mareschalle shall have knowlech in the said matere done in the werre beyonde the see, and in all maner dedes of armes here within the londe doone he hath cognoissaunce, and of the offenses doon beyonde the see he hath knowleche of here in the londe.

In other words, the court had jurisdiction in any of the following cases: (1) Crimes committed abroad. (2) Especially the transgressions of soldiers against the articles of war promulgated on the occasion of expeditions to the Continent. (3) Contracts growing out of war beyond the realm.[8] (4) Matters relating to war within the realm.[9] (5) Injuries to honor and encroachments in matters of armour and precedence.[10] Within its proper

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7 Our own subject.

8 Duck went so far as to say that "the Cognizance of all Foreign Contracts belongs to this Court," but added that "this was afterwards chang'd, and the Cognizance of these matters brought into the Courts of *Common Law*, by a Fiction declaring such Contracts to be made within the Kingdom," and similarly in criminal cases arising abroad. *Op. cit.*, xxxii.

9 Thus when the pretender Perkin Warbeck invaded England, "being taken in the war, it was resolved by the Justices, that he could not be punished by the common law, but before the Constable and Marshal (who had special commission under the great seal to hear and determine the same according to martial law) he had sentence to be drawn, hanged, and quartered, which was executed accordingly." 7 Coke's Rep. 6 b.

10 "As for instance, One *Brown* set forth in Libel his Descent; that another Person, in way of defamation, said, he was no Gentleman, but descended from *Brown* the great Pudding-eater in *Kent;* but it appearing he was not so descended, but from an Ancient Family, he that spoke the words underwent the Sentence of the Court, and decreed to give Satisfaction to the Party complaining." Rushworth, II, pt. 2, 1055.

sphere the court of the constable and marshal exercised a jurisdiction of which the common law courts would take notice, and not until this jurisdiction was abused did they interfere by writ of prohibition.[11]

This and other special courts, because of their "instinctive policy, inherent in such institutions, of extending their jurisdiction wherever possible," came to be looked upon with jealous disfavor both by Parliament and by the ordinary courts.[12] So it is not surprising to find that in the distracted reign of Richard II the Parliament demanded that restraints be placed upon the court of the constable and marshal. As to its civil jurisdiction this was accomplished by 8 Richard II, c. 5 (1384) as to "what Suit shall be discussed before the Constable and

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11 Hearne, Curious Discourses, ed. of 1773, I, 157; II, 271; Chambers v. Jennings (1701) 7 Modern 125.

In the debate on the Petition of Right, Bankes (afterwards Attorney General and Chief Justice of the Common Pleas) raised a question as to the extent of martial law jurisdiction, and said: "I will remove an objection out of 6 H. 8 in *Kellways* Reports, where it is said that *Fineax* told *H.* 8 it belonged to the Law of Arms to determine that power, but I conceive that opinion is no Law; The Common Laws Regulate in what Cases Commissions [of martial law] ought to be awarded, though it hath no Jurisdiction in them as in the Admiralty Court, or Martial Courts, if they take Cognizance of Cases, that belong to the Common Law, the Common Law grants Prohibitions, the Common Law is the Judge of other Courts, to keep them in their due bounds, this we see is the daily course of Prohibitions, and the Kings Bench doth regulate other Jurisdictions, so though the Common Law define not, nor set down the Law of Arms, yet the Law sets down when they are exercised." Rushworth, II, pt. 2, App., 76.

The opinion of Fineux, C. J., referred to above appears in Keilwey's Rep. 172. Henry VIII was concerned with the perquisites of the constable, not with the extent of the jurisdiction of the court over which he presided. Hearne, *op. cit.*, II, 250 *et seq.* The Lord High Constable, Buckingham, was executed in 1521, and thereafter the office was not permanently filled.

12 Stubbs, Const. Hist., 4th ed., II, 639. Also Holdsworth, 18 L. Q. R. 118.

Marshal of England" [13] and 13 Richard II, Stat. 1, c. 2 defining "The Authority of the Constable of *England,* and the Remedy where it is abused." [14] Encroachment in criminal cases was sought to be averted by 1 Henry IV, c. 14 (1399),[15] and a further limitation was imposed when, in 1439, the punishment of desertion from the King's army was confided to the courts of the common law.[16]

Finally, in 1640, Edward Hyde (later Lord Chancellor Clarendon) led an attack in Parliament upon the marshal's court [17] which culminated in the adoption of resolutions declaring it to be a grievance.[18] The court was

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13 "And because divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and discussed, are of late drawn before the Constable and Marshal of *England,* to the great Damage and Disquietness of the People; it is agreed and ordained, that all Pleas and Suits touching the Common Law, and which ought to be examined and discussed at the Common Law, shall not hereafter be drawn or holden by any Means before the foresaid Constable and Marshal, but that the court of the same Constable and Marshal shall have that which belongeth to the same Court, and that the Common Law shall be executed and used and have that which to it belongeth, and the same shall be executed and used as it was accustomed to be used in the Time of King Edward."

14 ". . . To the Constable it pertaineth to have Cognizance of Contracts touching Deeds of Arms and of War out of the Realm, and also of Things that touch War within the Realm, which cannot be determined nor discussed by the Common Law, with other Usages and Customs to the same Matters pertaining, which other Constables heretofore have duly and reasonably used in their Time . . ."

15 Enacting "That all the Appeals to be made of Things done within the Realm, shall be tried and determined by the good Laws of the Realm, made and used in the Time of the King's noble Progenitors; and that all Appeals to be made of Things done out of the Realm, shall be tried and determined before the Constable and Marshal of *England* for the Time being."

16 18 Hen. VI, c. 19.

17 Campbell, Lives of the Lord Chancellors, 4th ed., IV, 8, 11.

18 Rushworth, II, pt. 2, 1054–6.

never formally abolished, but Hale, writing after the Restoration, said that it had "been long disused upon great reasons" [19] and Blackstone recorded that it had "grown almost entirely out of use." [20] It appears that the last case tried before the marshal was in 1737.[21]

Thus the court of the constable and marshal died of atrophy. But its most important function persisted: the jurisdiction of offenses committed by the troops. When several armies were sent abroad it was found necessary to delegate to the various commanders authority "to execute marshall law, and, upon trial by an orderly court, . . . to inflict punishment . . . " [22] Thus the system of military justice gradually became divorced from the offices of constable and marshal, and survived the death of their court of chivalry.

The articles of war of that day, unlike those of the present in the British and American armies, were not statutory enactments. They were a code framed by the King and proclaimed by his own proper authority, for the government of his army.[23] Hale, in the passage which forms the chapter heading above, defines martial law as understood by himself and his contemporaries: the articles of war, rules promulgated for the government of the troops to be raised in time of war. This is now more accurately known as *military law.*

§ 2. Martial Law Applied to Civilians. The military court arose in the days of feudalism, when the line sep-

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19 Hist. Com. Law, 36.

20 Commentaries, Cooley's 2d ed., III, 68.

21 Sir H. Blount's Case, 1 Atk. 296. Holdsworth, 18 L. Q. R. 118.

22 Commission to Sir Thomas Baskerville, June 10, 1597. Camden Society, The Egerton Papers, 246.

23 Articles of war of 1385 and later are to be found in The Black Book of the Admiralty, 282 ff., 453 ff., and 459 ff.

arating civilians from soldiers was not well marked, and when any subject, when under arms serving the King, might be tried by martial law.[24] This would normally be only in time of hostilities beyond the channel. But in the Wars of the Roses the strife was domestic, and toward the end the struggle there were "very terrible powers of summary justice granted to the constable."[25] It is not surprising that at the close of the feudal period the nature of martial law, and its applicability as to time and as to persons, were shrouded in uncertainty.

Summary procedure "according to the justice of martial law" so commended itself to Tudor monarchs that they invoked it as an extraordinary mode of punishing civilians at pleasure. In the reigns of Henry VII[26] "and Henry VIII[27] it was used against rebels after the suppression of the rebellion. Edward VI proclaimed and enforced it against those who spread rumors of rebellion,[28] and set up a commission "to put in execution all such Martial Laws, as should be thought by their Discretions most necessary to be executed."[29] Mary proclaimed it against those who introduced heretical books,[30] and Elizabeth threatened to invoke it to punish those who circulated papal bulls or books threatening her throne.[31]

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24 Holdsworth, 18 L. Q. R. 117 at 123; Tytler, Essay on Martial Law, 3d ed., 39–40.

25 Maitland, Const. Hist., 266.

26 Bacon's Hist. of King Henry VII, "After the battle of Lincoln . . . "

27 Burnet, Hist. of the Reformation, I, 373.

28 Strype, Hist. Mem., II, 171, 175.

29 *Ibid.*, II, 373.

30 *Ibid.*, III, 459.

31 Strype, Annals, III, 568, 570.

The following incident shows that, to the mind of the imperious Queen Bess, *c'est mon bon plaisir* was reason enough for resorting to martial law.

And on July 18, 1595, at a moment of some popular disorder, she issued a commission to Sir Thomas Wilford which, after reciting that there were "sundry great unlawful assemblies of a number of base people, in riotous sort, both in the city of London and in the suburbs," appointed him provost marshal and charged him to execute such persons speedily to death.[32] But in fact the rioters were tried by common law, so that this and probably many other proclamations of martial law against civilians were merely threats.[33]

Peter Burchet, a Puritan zealot, conceived it to be his religious duty to kill Hatton, a courtier. By mistake he wounded Hawkins, of the royal navy. "This wicked Principle of murthering for God's Sake, the Queen apprehended so much Danger in . . . that at first she commanded the Murtherer to be immediately executed by *Martial* Law. And a Commission for that purpose was drawn up. . . . So the Queen in her great Closet, at Service therein, gave Order to Mr. Secretary to bring to her the Commission for Execution of this Man by the *Martial* Law, to be signed by her after Dinner." Strype, Annals, II, 288.

After dinner the royal indignation seems to have subsided, and in the mean time the Lord Chamberlain had summoned the Lord Treasurer to dissuade the Queen. Her Majesty "was informed by the wiser sort, that Martiall Law was not to be used but in Camps, or in turbulent times: but at home, and in time of peace, the proceeding must be *by forme of Judiciary processe.*" Burchet found a speedy solution to this constitutional crisis:—"being cast into the Tower of *London,* he slew one of his keepers . . . ; for which he was condemned for murther, had his right hand cut off, and nayled to the gallows, and then was hanged. . . . " Camden's Annals, under the year 1573.

32 Rymer's Foedera, XVI, 279.

33 Hallam, Const. Hist., c. 5; Stephen. Hist. Crim. Law, I, 210. There is an interesting brief comment on proclamations *in terrorem* in Hargrave, Collection of Tracts, 95. Tytler, *op. cit.,* 51, says of the time of Queen Elizabeth: "The exercise of Martial law on all classes of the people, was no more questioned as inherent in the royal prerogative, than the power of dispensing with the execution of the public statutes of the realm, the power of imprisonment at pleasure, the right of exacting loans and benevolences from the subject, and of erecting monopolies. It was not necessity that was cited to justify any infringement or suspension of law;

This practice was continued by the Stuarts, but from motives more patently despotic and at a time when Englishmen were more touchy. During the war with Spain in the last years of James I and the early years of Charles I, it was frequently the case that troops were stationed along the southern coast of England. On such occasions the king would issue his commission to various persons, civil and military, authorizing them to "proceed according to the justice of Martial Law against such soldiers . . . and other dissolute persons joining with them" as should commit robberies, felonies, mutinies, or other outrages or misdemeanors which by martial law were punishable by death.[34] Thereby the king precipitated a constitutional crisis.

§ 3. The Petition of Right, 1628. When Charles' third parliament met in 1628 it was in a mood to reform abuses. It compelled the King to assent to the Petition of Right[35] which contained the following provision on the subject of martial law:

> Sec. VII. And whereas also by Authority of Parliament, in the five and twentieth Year of the Reign of King *Edward* the Third, it is declared and enacted, That no man should be forejudged of Life or Limb against the Form of the *Great Charter* and the Law of the Land; (2) and by the said *Great Charter* and other the Laws and Statutes of this your Realm, no Man ought to be adjudged to Death but by the laws established in this your Realm, either by the Customs of the same Realm, or by the Acts of Parliament: (3) And whereas no Offender of what Kind soever is exempted

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the motive of convenience was equally sufficient for the prince; and the reason seemed equally plausible in the eyes of the people."

34 Rymer's Foedera, XVII, 647; XVIII, 254, 751, 763.

35 3 Chas. I, c. 1.

from the Proceedings to be used, and Punishments to be inflicted by the laws and Statutes of this your Realm: Nevertheless of late Time divers Commissions under your Majesty's Great Seal have issued forth, by which certain Persons have been assigned and appointed Commissioners, with Power and Authority to proceed within the land, according to the Justice of Martial Law, against such Soldiers or Mariners, or other dissolute Persons joining with them, as should commit any Murther, Robbery, Felony, Mutiny or other Outrage or Misdemeanor whatsoever, and by such summary Course and Order as is agreeable to Martial Law, and as is used in Armies in Time of War, to proceed to the Trial and Condemnation of such Offenders, and them to cause to be executed and put to Death according to the Law Martial:

Sec. VIII. By Pretext whereof some of your Majesty's Subjects have been by some of the said Commissioners put to Death, when and where, if by the Laws and Statutes of the Land they had deserved Death, by the same Laws and Statutes also they might, and by no other ought to have been judged and executed.

Sec. X. . . . (5) And that the aforesaid Commissions, for proceeding by Martial Law, may be revoked and annulled; and that hereafter no Commissions of like Nature may issue forth to any Person or Persons whatsoever to be executed as aforesaid, lest by Colour of them any of your Majesty's Subjects be destroyed, or put to death contrary to the Laws and Franchise of the Land.

§ 4. The Petition of Right as Applicable to Soldiers. It has not always been clear just what the Petition of Right forbade. Did Parliament condemn the then recent commissions of martial law merely on the ground that "other dissolute persons" besides soldiers were in-

cluded? Certainly this was an aggravation. As Noy [36] said during the debate on the Petition,

> This Commission is not justifiable, for though it were intended for the Army, it is somewhat too large, it extends to the Souldiers and Mariners, and others that join with them.[37]

But the inclusion of civilians was not the only ground for objection. The fact is that Parliament looked with such apprehension upon standing armies and upon special courts that it denied to the Crown the authority to punish even its own troops by martial law where the common law courts were available.[38] Rolle [39] declared in the debate

> If the Martial Law in time of Peace should be executed on Souldiers, that were a great dishonour and prejudice to them.[40]

John Selden was a member of the committee which framed the Petition, an activity for which he was subsequently imprisoned. In his speech on martial law he said

> Let [soldiers] not condemn me or the law, the cause concerns them, and their lives and liberties, as much as ourselves. . . . As for soldiers. Admit other men are not subject, yet whether are soldiers in time of peace? They are not. The earl of *Lancaster* was a soldier, and upon him martial law could not be executed. In those

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36 Afterwards the King's Attorney General. "As a lawyer he had in his day no superior." Hale was his pupil. 14 Dict. Natl. Biog. 698.

37 Rushworth, Historical Collections, II, pt. 2, App., 80.

38 Maitland, *op. cit.*, 327; Selden, Table Talk, 190 note; Charge of Cockburn, L. C. J., in Queen v. Nelson and Brand, 66–9.

39 Afterwards Lord Chief Justice, author of the Abridgment.

40 Rushworth, II, pt. 2, App., 79.

> days there were no gentlemen but what were soldiers. Admit there were a jurisdiction in those that have the commission, yet whether are soldiers under the jurisdiction of the common law? Many statutes were made against soldiers that departed from the king's service, and they were put to death. . . . What needed that if it might be done by martial law? [41]

Notwithstanding the Petition of Right, the King, in 1638, issued a commission of martial law to the commander of the army raised to quell the rebellion in the north of England.[42] Two classes of persons fell under the authority which the Crown purported to grant to the general. First, rebels: he was charged "to slay . . . such and as many as you shall think meet . . . , to the terror of all other offenders." Second, the general, in person or by deputies, was authorized "to hear all criminal causes growing and arising within the Army . . . and all causes civil, whatsoever they be" and to make "Ordinances for the good government, rule and order of the Army." Such an assumed power was illegal, in respect of the army as well as of civilians. The general was in a quandry. The legality of his commission was discussed at the Council Board in July, 1640, and "the lawyers and judges were all of opinion that Martial Law cannot be executed here in England, but when an enemy is really near to an army of the king's," and that a pardon would be necessary for the officers who had executed a soldier for mutiny. Two soldiers were then under arrest for homicide and the general did not dare to punish them; nor, in the interest of discipline, could he allow the army to know the weakness of his legal powers. The House of Lords was disposed to authorize

41 Works, III, 1985, 1989. See also his Table Talk, under *War*.

42 This paragraph is based on Clode, Military and Martial Law, 6–7.

the commander to punish his soldiers by martial law; but the Commons held back, and not until 1642 did the two Houses concur in authorizing such a measure.[43] In general, down to the time of the first Mutiny Act in 1 William and Mary, statutory assistance in the enforcement of discipline while the army was within the realm consisted of certain acts which made desertion punishable as a felony in the common law courts.[44]

§ 5. **Martial Law in Time of Peace.** Another mooted question is, Did the Petition of Right declare martial law to be illegal at all times, or only in time of peace? We look first to the text. Martial law is referred to as a procedure such "as is used in Armies in time of war." The recent commissions were directed against soldiers and civilians, and it is commissions "of like nature" which are forbidden. It was in fact a time of peace. Martial law was admittedly applicable to soldiers in time of war. So too against alien enemies, even within the kingdom. Might it ever be applied to civilians? Could the Crown create a constructive state of war, and assimilate rebels to foreign enemies? It was notorious that such a power had *de facto* been exercised.

The framers of the Petition of Right were meeting a then present difficulty. They were not formulating a comprehensive statute on the royal prerogative or on the rights of the subject.[45] And they proceeded in a char-

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43 Journal, H. of L., V, 343.

44 Sir Henry Thring, in the Manual of Military Law (British War Office, 1884), 9. Such statutes were 18 Hen. VI, c. 19 (1439); 7 Hen. VII, c. 1 (1490); 3 Hen. VIII, c. 5 (1511); 2 & 3 Edw. VI, c. 2 (1548); 4 & 5 Philip and Mary, c. 3, § 9 (1557).

45 "In this Disputation I will not trench on Power, but the abuse of it" said Rolle. Rushworth, II, pt. 2, App., 79. So too Selden. Works, III, 1985.

acteristically English way, by applying a specific remedy to a specific abuse. So Finlason, who later sought to make a case for a royal prerogative to proclaim martial law against rebels, was happy to note that the language of the Petition was applicable only to peace-time commissions similar to those of 1624–26; it "says not a word as to martial law for suppression of rebellion." [46] Holdsworth,[47] Clode,[48] and Ridges [49] agree in interpreting the language of the statute as a restraint upon the exercise of martial law only in time of peace.

The courts have had occasion to remark that the Petition of Right does not make any express provision on the subject of martial law in time of war. But they have not been agreed as to the conclusion to be derived therefrom. Lord Chief Justice Cockburn, in his charge to the grand jury in Queen v. Nelson and Brand, said

> Two views have been propounded of this celebrated statute. The one that its effect is limited to commissions such as those of which the Commons had more immediate cause to complain, and especially to commissions issued in time of peace; the other that it was intended to prevent the exercise of martial law against the subject, under any circumstances, and even as against the soldier, except in the case of "armies in time of war." The latter would appear to have been the view of Lord Hale, and the words of the statute are certainly large enough to embrace the more general position; nor is it at all probable that the Commons, many of whom must have foreseen that, as things were going on, armed resistance to the encroachments of the prerogative might become inevitable, intended to leave the subject,

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46 Commentaries upon Martial Law, 89 note.
47 18 L. Q. R. 117 at 120.
48 Military Forces, II, 156–7.
49 Const. Law, 2d ed., 33.

in the event of popular commotion, at the mercy of martial law.[50]

The next year Lord Justice Blackburn expressed a different view:

> The Legislature . . . did not in terms declare that in time of war [the Crown] shall not have the power, but it does not by any means follow that they sanctioned and recognized that doing so in time of war was legal. The great statesmen as well as great lawyers at that time in Parliament were sensible enough to be aware that in fighting the Crown at such a time they should take care that they were distinctly in the right; that there should be no doubt about the point on which they took their stand. They did not, therefore, say that Queen Elizabeth did such things at the time of the rising in the North as were illegal . . . It may very much be doubted . . . whether the Puritans, who were the great party who struggled against Charles, would have altogether sympathised with the implied attack on the Protestant Queen Elizabeth if it had been made, for the mode in which she put down the two Popish earls for the rising in the North; and they, therefore, as wise statesmen did not take that point. I think, therefore, it would be an exceedingly wrong presumption to say that the Petition of Right, by not condemning martial law in time of war, sanctioned it, still it did not in terms condemn it.[51]

A much-controverted construction is that of Lord Chancellor Halsbury:[52]

> The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.

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50 F. Cockburn's Report, 66.

51 Charge in Queen v. Eyre, Finlason's Report, 73.

52 Speaking for the Judicial Committee of the Privy Council in the Marais case [1900] A. C. 109 at 115.

These judicial expositions are obviously not wholly reconcilable. Blackburn and Halsbury agree that the Petition does not speak to the subject of martial law in time of war, though they are not agreed as to the inference to be drawn therefrom. Cockburn thought the Petition broad enough to forbid martial law against civilians at any time.

If we ask not what the Petition forbade, but what its authors thought about martial law, it is clear that they did not mean to concede any prerogative to proceed summarily against civilians in time of war or rebellion. To their minds martial law was identical with, or at least included, military law; and even against the army it might be exercised only in time of war.[53] Bankes[54] argued that a commission of martial law "ought only to be awarded in time of War, or inevitable necessity. . . . We have no time of War, when the Courts of Justice are open in *Westminster* and other Jurisdictions."[55] Mason[55a] stated

> We all know and admit, in the time of War, when the Kings Courts are shut, the Law Martial may be executed. . . . We have now no Army in the Field, no Enemy but among ourselves, and it is no time of War, and therefore the Commission is not fit, nor warranted by Law.[56]

And Rolle declared

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53 Baty and Morgan, War: Its Conduct and Legal Results, 18–9.

54 Later Chief Justice of the Common Pleas. As Attorney General he represented the Crown against John Hampden in the Ship Money Case (1637) 3 How. St. Tr. 825.

55 Rushworth, II, pt. 2, App., 76–7.

55a Afterwards Recorder of London.

56 Rushworth, 78–9.

> Martial Law is meerly for necessity, where the Common Law cannot take place; now for the time when that necessity falls out, in time of Peace it cannot, so now we must consider when is time of Peace or War.
>
> If the *Chancery* and Courts of *Westminster* be shut up that are *Officina Justitiae,* it is time of War, but if the Courts be open it is otherwise; yet if War be in any part of the Kingdom, that the Sheriff cannot execute the Kings Writ, there is *tempus belli.*

"If an army were gathered together against an enemy, martial law might be used," said Selden.[57] "When the Courts are open Martial-Law cannot be Executed" concluded Sir Edward Coke.[58]

In professing this unanimous view these lawyers were urging no innovation.[59] Sir Thomas Smith, a Secretary of State under Edward VI and Elizabeth and "no anti-royalist,"[60] had written sixty years earlier:

> In warre time, and in the field the Prince hath also absolute power, so that his worde is a law, he may put to death, or to other bodilie punishment, whom he shall thinke so to deserve, without processe of lawe or forme of judgement. This has beene sometime used within the Realme before any open warre in sodden insurrections and rebellions, but that not allowed of wise and grave men, who in that their judgement had consideration of the consequence and example, asmuch as of the present necessitie, especiallie, when by anie meanes the punishment might have beene doone by order of lawe. This absolute power is called marciall lawe, and ever was and necessarilie must be used in all campes and

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57 Works, III, 1990.

58 Rushworth, 81. And see his Third Institute, 52.

59 "We will not be Authors of new Opinions, but maintain the old" said Bankes during the debate. Rushworth, 77.

60 Pollock, 18 L. Q. R. 152.

> hostes of men, where the time nor place do suffer the tariance of pleading and processe, be it never so short, and the important necessitie requireth speedie execution, that with more awe the souldier might be kept in more straight obedience, without which never capitaine can doe anie thing vaileable in the warres.[61]

Hale, writing in the reign of Charles II, was clear that martial law connoted a law for the government of the troops; that it was allowable as to them only in time of war; and that under no circumstances was it legally applicable to the civil population.[62]

With this view Blackstone was in agreement.[63]

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61 De Republica Anglorum, lib. 2, c. 3.

62 Hist. Com. Law, 34 ff.

"But touching the business of martial law, these things are to be observed, viz.

"First, that in truth and reality it is not a law, but something indulged, rather than allowed, as law; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance, quod enim necessitas cogit defendit.

"Secondly, this indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others; for others who were not listed under the army, had no colour or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts; but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

"Thirdly, that the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the King's courts are open for all persons to receive justice, according to the laws of the land. This is in substance declared by the petition of right, 3 Car. I. whereby such commissions of martial law were repealed, and declared to be contrary to law . . . ."

63 It is important to note what "martial law" signified to his mind: "When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary than could be expected from a mere militia. And therefore at such time more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part

We conclude that to the publicists of the sixteenth, seventeenth, and eighteen centuries "martial law" meant a regime applicable to soldiers in time of war (*i. e.*, when the courts were closed). If this were the whole story "martial law" might be neatly tagged and filed on some out-of-the-way shelf. But the Crown had in fact used the expression to denote a regime whereby civilians might be punished at discretion. Admit that this was mere pretense, with little constitutional foundation. But the Petition did not expressly negative such a power. So in later times friends of the prerogative were able to argue that there was a "martial law" which might be proclaimed in time of public danger. To what difficulties the resulting confusion has led will presently appear.

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of the permanent and perpetual laws of the kingdom. . . . The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." Commentaries, Cooley's 2d ed., I, 412.

CHAPTER II

THE PROBLEM

> What is martial law? What is meant by the proclamation of martial law? Who has power to declare martial law? How does such a state exist lawfully, and what are the effects of its existence? All these are questions of great interest, to which, however, it is not easy to find satisfactory answer.
>
> Attorney General Caleb Cushing. 8 Opinions of the Attorneys General, 365.

§ 6. Obscurity of the Term "Martial Law." At the very outset of a study of martial law one is bewildered by the haze of uncertainty which envelops it. The literature of the subject, whether found in decisions, legislative debates, official despatches, or commentaries, is replete with dicta and aphorisms often quoted glibly as universal truths, whereas they are properly limited to some particular significance of the term "martial law." "It is not a law, but something indulged, rather than allowed, as law;" [1] it is "built upon no settled principles, but is entirely arbitrary in its decisions;" [2] it is "nothing more nor less than the will of the general;" [3]

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1 Hale, Hist. Common Law, 34.

2 Blackstone, Commentaries, Cooley's 2d ed., I, 412.

3 The contribution of the Duke of Wellington. During the Peninsular campaign he wrote this of *military law*, but doubtless meant *military government*. Gurwood, Wellington's Dispatches, VI, 46. Later he said the same thing of martial law. 115 Hansard's Parl. Deb. 3s., 880. The dictum has enjoyed a vogue among American judges: United States v. Diekelman

it is "not a fixed, but a transitory law, variable by the general."[4] On the other hand, during the Boer War a South African judge declared that

> There can be no doubt that there are occasions when such an extraordinary power may be lawfully employed and it is, I think, a misuse of terms to speak of Martial Law as if it were an entire illegality.[5]

A reputable author disagreed with Hale and Blackstone and contended that martial law was certain, determinable, and immutable.[6] A very learned attorney general held that Hale labored under a "total misapprehension." "The common law authorities and commentators afford no clue to what martial law, as understood in England, really is. . . . In this country it is still worse."[7] And a highly respected Judge Advocate General of the British Army said of the dicta of Blackstone and others that "you would hardly find it safe to be guided by those definitions."[8] One who wrote in the midst of the Boer War found that martial law was not tyrannical, but limited and subject to rule.[9] But Maitland denied that there was any body of rules known as martial law.[10]

Martial law canot be used in England without authority of Parliament;[11] since the time of the Stuarts

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(1875) 92 U. S. 520, 526; In re Egan (1866) Fed. Cas. No. 4303; United States ex rel. Wessels v. McDonald (1920) 265 Fed. 754; United States ex rel. Seymour v. Fischer (1922) 280 Fed. 208.

4 Holt, C. J., (1704) 6 Modern 180.

5 Mason, J., in Morcom v. Postmaster General (1900) 21 N. S. Natal Law Rep. 32.

6 Tytler, Essay on Martial Law, 3d ed., 13.

7 Cushing, (1857) 8 Op. Atty. Gen. 365.

8 Sir David Dundas, M. P., 12 Parl. Papers (1850) question 5436.

9 King, Martial Law, (1900) 17 Cape L. J. 132.

10 Const. Hist. 491.

11 Comyns, Digest, Parliament, H 23.

it has been "totally exploded;" [12] "it is the most unconstitutional procedure conceivable;" [13] yet Parliament has regarded it as an "undoubted prerogative" of the Crown.[14] Great judges have declared that "it is totally inaccurate to state martial law as having any place whatever within the realm;" [15] "no authority for anything of the sort can be found;" [16] yet some authorities recognize one sense in which martial law is fully consonant with the English constitution.[17] An American writer calls it "a threat, . . . a mere bluff. There is, under the Constitution, no such thing." [18] In spite of all these disclaimers, martial law, however vaguely understood, is a term in current use. Many, perhaps all, of the statements quoted above are true, in some particular sense. But their authors are confusing, if not confused.

Lord Sumner has well said that martial law is a difficult subject because it lacks precision, abounds in paradoxes, and runs close to politics.[19] In a similar vein was the remark of Justice Solomon of the Supreme Court of the Cape of Good Hope in one of the many martial law cases arising during the Boer War. He said:

> The subject of martial law is certainly one of considerable obscurity; one which is not regulated by statute, and the limitations of which have never been clearly defined by judicial decision. . . . The opinions of text-

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12 Lord Loughborough, in Grant v. Gould (1792) 2 H. Bl. 69, 98.

13 Stephen's Commentaries, 17th ed., I, 197.

14 43 Geo. III, c. 117 (1803).

15 Lord Loughborough, *supra*, at 99.

16 Cockburn, L. C. J., in Queen v. Nelson and Brand, at 99.

17 Stephen, Hist. Crim. Law, I, 214; Dicey, Law of the Const., 8th ed., 284; Anson, Law and Custom of the Const., 3d ed., II, 186 note; Maitland, Const. Hist. 491–2.

18 Stimson, The American Constitution as It Protects Private Rights, 72.

19 154 L. T. 381.

writers and lawyers vary greatly, and in some instances lay down rules directly opposed to one another.[20]

§ 7. **The Proclamation of Martial Law.** It is a matter of common knowledge that governors of the several States and of British colonies and dominions do in various emergencies issue what purport to be proclamations of martial law. These usher in an extraordinary regime wherein the military authority issues regulations for the conduct of the civil population; individuals deemed troublesome will be seized and held without judicial process, and in some instances may be tried and sentenced even to death by a military tribunal. Soldiers may be ordered to take life to prevent the commission of a felony, or to punish, or perhaps to produce a moral effect.

What is the legal nature of such a proclamation? Does it endow the government with some extraordinary power such as it did not possess before? Or is it only an awful name for "the common law right of the [executive] to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders?"[21] Does the proclamation justify, or only give notice of the military measures the government purposes to take? Is the proclamation's recital conclusive of the facts? When, for example, in the course of a labor dispute in the mines of West Virginia the governor declared that a condition of war existed and that martial law should prevail, were the courts bound thereby?

It is frequently said that only necessity justifies martial law: What degree of necessity will suffice? Dicey would require "immediate necessity,"[22] thus agreeing

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20 In re Fourie (1900) 17 Supreme Court Reports 173, 182.

21 Stephen, Hist. Crim. Law, I, 208.

22 Law of the Const., 8th ed., App., note X.

with the Supreme Court in the Milligan case: "Martial law cannot arise from a *threatened* invasion."[23] Sir Frederick Pollock would be satisfied with apparent necessity in the face of some anticipated danger,[24] a view shared by a federal circuit judge who said that "the implements of warfare and the plan of carrying it out in the last gigantic struggle placed the United States fully within the field of active operations."[25] And to what extent does necessity justify—legally, or only morally? A regime of martial law often has as its sequel both civil and criminal actions at law. May the soldier come before the court with confidence, or must he secure an act of indemnity? Why are such acts passed if necessity provides a legal justification? In the United States would an act of indemnity be constitutional?

What branch of government is the final judge of the necessity of acts, otherwise unlawful, which, it is alleged, were requisite in the emergency? The legislature, by granting or withholding an act of oblivion? The executive, by a conclusive proclamation? Or the judiciary? If left to the judges, one court might, on habeas corpus proceedings, free military prisoners, while another court would decline to interfere. This in fact was the situation in Ireland in 1921.[26] If the courts are to have the last word, may they interfere during the period of martial law, or only afterwards? In many cases afterwards will be too late. Does martial law suspend the courts—or

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23 (1866) 4 Wall. 2 at 127.

24 18 L. Q. R. 162.

25 Manton, J., in United States ex rel. Wessels v. McDonald (1920) 265 Fed. 754.

26 Egan v. Macready [1921] 1 Irish Rep. 265, where the Chancery Division of the High Court disagreed with the decision of the King's Bench Division in The King v. Allen [1921] 2 Irish Rep. 241.

must the courts be suspended before martial law may be proclaimed?

§ 8. **Limiting Martial Law.** If so-called martial law is ever justified, it will still be necessary to place limits on its exercise, in time and in space. May a proclamation be given retroactive effect, making a person amenable to military trial for acts prior to the proclamation? What of the very acts which gave rise to the proclamation—these are the offences the government most wishes to punish. And in area—may the government go beyond the proclaimed zone to seize some person who is aiding those whom the government would put down? Might an inflammatory newspaper at some distance from the disorder be supressed? By the ordinary principles of criminal law these measures seem grossly improper.

Some authorities recognize degrees of martial law: preventive and punitive. The former comprises measures necessary to suppress disorder, but not to punish the offenders. An insurgent might be detained until the insurrection was suppressed, but would then be released or surrendered to the civil authorities for trial. But on some occasions the courts have upheld punitive martial law, where breach of military regulations may lead to punishment by military commission. This phase bristles with difficulties. Do sentences so imposed lapse with the passing of the military regime? May the statutory punishments be exceeded? What is the composition of a military commission, and what rules of procedure must it follow? As a matter of fact, members of such tribunals are generally acquainted with the code of military law governing the army, and generally comply with its formalities. Are they obliged to do so? And if they do are they protected as would be the judges of a civil tribunal?

It may be the legality of punitive martial law and the answers to other questions depend on whether war or peace prevails. What determines a state of peace? The ancient test was whether the courts were open, and this fiction was adopted in the Milligan case.[27] How far this test has been departed from in more recent decisions will appear presently. The Supreme Court of the United States has never overruled the majority opinion in this leading case; it has, in fact, had no occasion to do so. But the new chief justice has indicated that in his opinion the language might need modification.[28] The old test has obvious demerits in a time of extensive hostilities under modern conditions.

§ 9. **Other Questions Incidental to Martial Law.** So far we have put questions involving the power and liability of a commander. What of subordinates? A sentinel, pursuant to orders, shoots and kills in defending his post; or a junior officer is ordered to sit on a military commission which later sentences a prisoner to death. Are the orders of a superior officer a justification for acts otherwise criminal? Soldiers are placed in the dilemma of having to choose between disobedience and homicide. For criminal offences the executive may grant pardon or the legislature indemnity; but what of civil actions arising out of tort?

Then there are questions peculiar to American constitutional law. What will be the effect of the bills of rights, of the provisions concerning the writ of habeas corpus, and the prohibition against taking life, liberty or property without due process of law? How far do

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27 (1866) 4 Wall. 2.

28 Hughes, War Powers Under the Constitution, 12. (Sen. Doc. No. 105, 65th Cong. 1st Sess.)

these guarantees go before they are neutralized by the war power or some other constitutional provision?

§ 10. Social Aspects of the Problem. Martial law is not a constitutional abstraction or a riddle for whose solution the law books will suffice. In American practice it is a clumsy *modus operandi* which has been hit upon in keeping industrial conflict within some bounds. It has sometimes degenerated into a grim class struggle.[29] When a movement—strike, racial unrest, or what not—threatens to destroy the social or economic equilibrium of a community it will be resisted instinctively, often frantically, by those whose position is menaced. They have come to identify their own well-being with the public good. If they control the government they will employ its power to suppress the subversive movement. Thus in the British Empire "martial law" followed by

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[29] Cf. the testimony of United States Senator T. M. Patterson, before the Commission on Industrial Relations, VII, 6491. In Denver, on receipt of news of a fight between militia and strikers at Ludlow, the whole working population "were in a frame of mind that bordered on desperation. . . . The next day I went to a meeting of the chamber of commerce. I found there that the minds of the sedate members of that body were in an equally inflamed state. It was one of the clearest evidences of class consciousness that I ever saw." In 1927 a Colorado editor, M. M. Rice, wrote: "I doubt that there is any person in the State of Colorado who can at this time give an absolutely clear, accurate, and unbiased explanation of the present situation. It is bound up with too much contradiction and counter-contradiction, too much bitterness, and too much obscurity to be unraveled. Indeed, the thirteen years since Ludlow have not served to explain even that completely." 119 Indep. 655.

In the debate on martial rule in the Punjab Bonar Law recalled the similar controversy after the Negro insurrection in Jamaica, and "the extent to which the whole Empire was divided from top to bottom on the issue raised. Then, as now, it was not, I think, a question of argument so much as of temperament, and criticisms arose according to different points of view from which these things are regarded." 131 H. C. Deb. 5 s., 1806.

an act of indemnity has been a device whereby servile and native uprisings have been stamped out, often with more celerity than decorum. In America it is industrial rather than racial antagonism that has evoked "martial law." Conflicting as the testimony is, one who reads the despatches and the minutes of investigations cannot escape the conclusion that the state's power has not always been wielded with perfect impartiality.[30] How military force may be exerted when necessary to preserve ordered liberty without becoming arbitrary or biased is a problem which, to be settled rightly, will call for statesmanship of a high order.

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30 "It seemed the militia was on the side of the operators in this controversy, and the evidence seems conclusively to prove such to have been the case." Report on the Colorado Strike Investigation (of 1914), House Doc. No. 1630, 63d Cong. 3d Sess., at 16.

CHAPTER III

THE NATURE OF MARTIAL RULE

> People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial . . .
>
> Let us call the thing by its right name; it is not martial law, but martial rule.
>
> David Dudley Field, in his argument in Ex parte Milligan (1866) 4 Wallace 2, 35.

§ 11. **Martial Law and Martial Rule.** When a mathematician is dealing with several quantities all of which are denoted by the same symbol, he avoids error in writin his equations by adding subscripts, as M_1, M_2, M_3. Students of social relationships might profitably emulate this accuracy in their use of words. In particular, if the same care had been exercised by those who have written on "martial law," endless misunderstanding would have been avoided.[1] For the term has several very different meanings. First there was the "marshal law" enforced in early times by the constable and marshal and extending to some matters totally unrelated to martial forces.[2] Then the term is associated with that punishment "ac-

1 Stephen, Hist. Crim. Law, I, 207 ff.

2 Coke, Fourth Institute, c. 17; Maitland, Const. Hist., 266.

cording to the justice of martial law" which Tudors and Stuarts called down upon the heads of troublesome persons, at times and places quite apart from military operations. In proclaiming this sort of martial law the sovereign assumed to suspend at will the established laws of the realm. Then there is martial law meaning military law, a code for the government of the army in peace and in war. The words had this connotation at the period when the first American constitutions were framed.[3] Martial law is still commonly used in a fourth sense as military government, that is, "military power exercised by a belligerent by virtue of his occupation of an enemy's territory, over such territory and its inhabitants."[4] Dr. Lieber used the expression in this sense when he drafted the celebrated general orders for the government of the armies of the United States in the field (1863).

There remains a fifth sense in which martial law is used, which Sir James Fitzjames Stephen described as "the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders."[5] Our own Supreme Court has characterized it as a jurisdiction to be called into action "in the case of justifying or excusing peril, . . . in times of insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law no longer adequately secures public safety and private rights."[6] It is with martial law in this sense that the present study is concerned. But the expression is a misnomer. Since this power is "a part, though an extraordinary part, of

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3 So used, *e. g.*, by Lieut. Adye, judge advocate to General Gage, in his Treatise on Courts Martial, New York, 1769.

4 Manual for Courts-Martial (1921) War Dept. Doc. No. 1053, 1.

5 *Op. cit.*, I, 208.

6 Ex parte Milligan (1866) 4 Wall. 2.

the Common Law,"[7] it must be justified or excused by its necessity, according to the circumstances of the case. Not everything, therefore, which is done under the name of martial *law* is legal.

Martial law in the first sense used above is obsolete. In the second it is unlawful. In the third and fourth senses it is now properly called military law and military government respectively. In the fifth connotation it is more accurately described as *martial rule,* which obtains in a domestic community when the military authority carries on the government, or at least some of its functions. Martial rule may exist *de facto;* the term is noncommittal as to its legality.

§ 12. Martial Rule Differentiated from the Use of Troops in the Aid of Civil Authorities. It sometimes happens that local civil officers prove inadequate to preserve order. In such cases a civil authority, as a mayor or sheriff, may address a precept to the commander of some local organization of the State militia, directing him to mobilize his force and report to the civil officer to aid in maintaining the peace. When so employed the troops are merely supporting the civil authority. The commander looks for directions to the magistrate by whose precept he was summoned. These directions should be to accomplish a specific object, as to clear a street or guard a building. The commander may expect the magistrate to tell him what to do, but not how to do it, as the soldier should be allowed to use his discretion as to the tactical dispositions best adapted to the accomplishment of his mission.[8] So long as the situation re-

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7 Pollock, Expansion of the Common Law, 105.

8 Ela v. Smith (1855) 71 Mass. (5 Gray) 121; 34 Cyc. 1789; Army Regulations 500–50, June 6, 1923.

In many States it is provided by statute that the military officer may

mains under the control of the local magistrates martial rule does not obtain.

British courts have had more occasion than those in America to block out the principles of law governing the use of troops in the aid of civil authorities. During the first year of the Hanoverian dynasty there was agitation for the Stuart pretender. To enable Government to cope with these disorders, Parliament passed the Riot Act,[9] providing that where twelve or more persons were riotously assembled it should be lawful for an officer of the peace to make a proclamation in the king's name directing the rioters to disperse. If the riot continued one hour thereafter, those engaged should be adjudged felons and should suffer death. Any subject might be called upon to assist in dispersing the riot, and if in so doing he should kill or injure a rioter, he was indemnified civilly and criminally. On the statute books of a number of the States will be found provisions for the suppression of riots evidently inspired by this English model.[10]

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use his discretion in the measures taken in obeying a precept: Ala. Code 1928, § 4980; Ariz. Rev. Stats. 1913, Civil Code § 3950; Crawford and Moses' Ark. Dig. 1921, § 7175; Calif. Pol. Code 1872, §§ 1920, 1921, added by Stats. 1905, p. 290; Fla. Comp. Gen. Laws 1927, § 2046; Ga. Code 1926, § 1467 (79); Kans. Rev. Stats. 1923, c. 48, § 242; Carroll's Ky. Stats. 1922, § 2711a–109; La. Act 191 of 1912, p. 337, § 74; Mass. Gen. Laws 1921, c. 33, § 34; Mich. Comp. Laws 1915, c. 40, § 41; Hemingway's Ann. Miss. Code 1927, § 6500; Mont. Rev. Codes 1921, § 11664; Nev. Rev. Laws 1912, § 4058; N. Mex. Stats. 1915, § 3868; Ore. Laws 1920, § 9651; Complete Texas Stats. 1928, Art. 5833; Va. Gen. Laws 1923, § 2673g; W. Va. Code 1923, c. 18, § 55.

9 1 Geo. I, Stat. 2, c. 4 (1715).

10 Ala. Code 1928, §§ 4969–4971; Ga. Code 1926, §§ 1467 (82), 1467 (83); Cahill's Ill. Rev. Stats. 1929, c. 38, ¶¶ 522–524; Me. Rev. Stats. 1916, c. 125, §§ 12–14; Mass. Gen. Laws 1921, c. 269, §§ 1–7; Mich. Comp. Laws 1915, c. 252, §§ 1–7; Mont. Rev. Codes 1921, §§ 11292, 11658–9; N. J. Comp. Stats. 1911, pp. 4380–1; Ore. Laws 1921, §§ 9647–8; W. Va. Code 1923, c. 18, §§ 56–61.

In 1768 there occurred several riots in protest against the trial of John Wilkes then going on before the King's Bench. Eventually a magistrate of Surry, Gillam by name, summoned the Guards. After twice reading the proclamation authorized by the Riot Act he directed the troops to fire. Subsequently Gillam was indicted for murder and brought to trial at the Old Bailey, where the law officers defended him. He was acquitted, the judges holding that on common law grounds, quite aside from the Riot Act, the magistrate "had done no more than was his Duty to do, and he would have been answerable to the Public if he had not done it." [11] A soldier who in suppressing this riot had caused the death of a boy was subsequently tried for murder, but his defence was also conducted by the government and resulted in acquittal.[12]

In spite of the favorable outcome to both magistrate and soldier, the effect of these prosecutions could only be to deter the use of armed force to preserve order.[13] Dr. Johnson remarked that "the magistrates dare not call the guards for fear of being hanged. The guards will not come for fear of being given up to the blind rage of popular juries." [14] In 1780 occurred the Lord George Gordon riots against the removal of certain penalties imposed upon Roman Catholics. The courts continued to sit, but the rioters seemed to have complete mastery everywhere except in Westminster Hall. "The mischief the rioters did was from persuasion, confirmed by example, that the troops did not dare to act." [15] The magistrates were apathetic, some through fear, others from

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11 Clode, Mil. Forces, II, 630–5.

12 Adolphus, Hist. of Eng., I, 340 ff.

13 Campbell, Lives of the Lord Chancellors, 4th ed., VIII, 42; Belsham, Memoirs of the Reign of George III, III, 22.

14 Boswell, Life of Johnson, Crocker ed., Lond. 1860, 509.

15 2 Douglas Rep. 436 note.

favor. The King resolved to do his duty, and called a meeting of the Privy Council where all the judges attended. It was proposed that martial law be declared, to which all seem to have agreed except Justice Gould. Finally it was decided merely to order the military commanders to act at their discretion, without awaiting the direction of the civil magistrates.[16] The lord mayor of London was prosecuted by information and convicted of a breach of duty, in that he had not ordered the troops to quell the riots by force. In instructing the jury Lord Mansfield said:

> The common law and several statutes have invested justices of the peace with great powers to quell riots, because if not suppressed, they tend to endanger the constitution of the country; and, as they may assemble all the King's subjects, it is clear they may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. It is well understood that magistrates may call in the military. It would be a strange doctrine, if, in an insurrection rising to rebellion, every subject had not a power to act, when they possess the power in a case of a mere breach of the peace.

Of the Riot Act Lord Mansfield said:

> It is a step *in terrorem* and of gentleness; and it is not made a necessary step, as the magistrate may instantly repel force by force.[17]

It was *prima facie* a duty of the magistrate to make the proclamation; fear was no excuse for failure. The question was whether the defendant had showed ordinary firmness.

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[16] de Castro, The Gordon Riots; Clode, *op. cit.*, II, 166 ff., 635 ff., 659–60.

[17] Rex v. Kennett (1781) 5 C. & P. 282 at 294, 295.

In a later case Lord Mansfield reverted to the Gordon riots:

> I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. In 1780 this mistake extended to an alarming degree; soldiers with arms in their hands stood by and saw felonies committed, houses burnt, and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them. . . . If it is necessary for the purpose of the preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty to exert themselves in assisting the execution of a legal process or to prevent any crime or mischief being committed.[18]

So it appears that the use of force to preserve the peace and prevent the commission of a felony may be justified at common law, regardless of the Riot Act; that in this respect the soldier is said to enjoy no privileges and to be subject to no special obligations. "A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner." [19]

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18 Burdett v. Abbott (1812) 4 Taunt. 401 at 449.

19 Bowen, L. J., Sir Albert K. Rollit, M. P., and R. B. Haldane, Q. C., M. P., in the report of the committee to inquire into the disturbances at Featherstone on Sept. 7, 1893. 11 Parl. Papers (1893) Cd. 7234, at 10. Quoted in Dicey, *op. cit.*, 513. To a similar effect, Lord Sumner in 154 L. T. 381.

A few years later (in 1796) this matter was put more satisfactorily by the law officers, Sir John Scott[20] and Sir John Mitford:[21]

> So far as is consistent with obedience to military discipline and command, we apprehend the civil magistrates have power to call for the assistance of the military as they have to call for the assistance of other of His Majesty's subjects. . . . But we apprehend the magistrates cannot require from the military any assistance repugnant to the obligations of their military duty.[22]

And again:

> We conceive that the military duty of a soldier remains whilst he acts under the orders of a civil magistrate; that he is still necessarily subservient to military discipline; and that the command of a magistrate cannot exempt him from that discipline.[23]

It has been pronounced a sophism to say that the soldier when called to support the civil power is acting merely as a citizen.[24] Doubtless the dictum would be unchallenged with regard to soldiers called individually. But this is not the manner in which troops are employed; the precept is directed to the commanding officer, summoning a unit held in the bonds of discipline. The effi-

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20 Afterwards Lord Chancellor Eldon.

21 Afterwards Lord Redesdale, Lord Chancellor of Ireland.

22 Clode, Mil. Forces, II, 638.

23 *Ibid.*, II, 645. Cited with approval in The Queen v. Glamorgan County Council [1899] 2 Q. B. 26. See also the language of A. L. Smith, L. J., in the same case on appeal [1899] 2 Q. B. 536 at 543–4.

Other important English authorities on the use of troops to aid the civil power are Rex v. Pinney (1832) 5 C. & P. 282; Redford v. Birley (1822) 1 St. Tr. (N. S.) 1071; Charge of Tindal, C. J., (1832) 3 *ibid.* 2; Regina v. Neale (1839) 9 C. & P. 431.

24 Hallam, Const. Hist. of England, III, 263; Birkhimer, Military Government and Martial Law, 412 note.

cacy of their action will depend upon their responding to a single word of command. When that command comes, a soldier can scarcely be expected to leave the ranks to determine from his own inspection whether under the circumstances the order was a proper one to give. It cannot be denied that some remarks that fell from the lips of Lord Mansfield and other judges are not wholly reassuring to soldiers. In 1780 the parliamentary opposition was seeking to show that the government had acted unconstitutionally, while Lord Mansfield and Lord Chancellor Thurlow sought to show that the cry of martial law was unfounded. "The military have been called in . . . not as soldiers, but as citizens: no matter whether their coats be red or brown," said the former.[25] "The military . . . were every one of them amenable to the law, because no word of command from their particular officer . . . could warrant or sanction their acting illegally," declared the Lord Chancellor.[26]

That a soldier so employed is still subject to civil trial is indisputable. It also seems clear that he would be personally liable for excess of severity, as would a private citizen. But it does not necessarily follow that the man in ranks may not find protection for his conduct in the fact that he was obeying commands, not patently illegal, given by his superior officer. But this subject will be discussed more fully below.[27]

The leading American case on the use of troops to aid the civil authorities is a well-considered Massachusetts decision, Ela v. Smith.[28] In 1854 a Negro was being returned from Boston to Virginia. Apprehending that a

25 21 Parl. Hist. 698.
26 *Ibid.*, 737.
27 Arts. 55–8.
28 (1855) 71 Mass. (5 Gray) 121.

mob might interfere, the mayor, as authorized by statute, called the militia to his aid. Lines of sentinels were thrown out, through which the United States marshal conducted his prisoner. One Ela attempting to break through a line was driven back by the soldiers and cut over the head. He brought suit. Speaking for the Supreme Judicial Court, Bigelow, J., said in part

> The precept of the mayor was in exact conformity to the terms of the statute. It was, therefore, a warrant regular on its face, issued by a magistrate of competent authority, within the scope of his jurisdiction. On familiar principles, it affords a complete justification to all those bound to obey its command, for acts lawfully done by them in pursuance thereof.

It was the early practice of the federal government to permit the military forces of the United States to be employed in subordination to a United States marshal when necessary to enforce his process. This practice was deemed to be well sustained under the Judiciary Act [29] which authorized the marshal "to command all necessary assistance in the execution of his duty." [30] But by the act of June 18, 1878,[31] Congress made it unlawful to employ any part of the army as a posse comitatus or otherwise, save as *expressly* authorized by the Constitution or by act of Congress. When troops are used within the continental limits of the United States the only civil authority to whose orders they are subject is the President, acting through the Secretary of War. They should, of course, be used in concert, so far as may be practicable, with the civil officers of the State or federal govern-

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29 Of 1789, § 27, 1 Stat. 87.

30 Following the language of Attorney General Devens. (1878) 16 Op. Atty. Gen. 162.

31 20 Stat. 152.

ment.[32] And the President may direct them specifically to lend their support to a State or federal magistrate.[33] But the chain of command remains unbroken, and in no proper sense may they be referred to as acting in subordination to local civil officers.[34]

A writ of habeas corpus issued from a federal court would presumably be obeyed; but Tarble's case [35] would furnish authority for declining to comply with State process.

§ 13. **"Martial Law" and Military Law.** The Constitution of the United States provides that Congress shall have power "to make Rules for the Government and Regulation of the land and naval Forces" as well as for governing the militia when in federal service.[36] In these and other military provisions is to be found authority for the existing code of military law. Since this code is applicable, in general, only to members of the military service, and since even such a person may be tried by a civil tribunal for a non-military offense,[37] mili-

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32 Dowell, Military Aid to the Civil Power, 206.

33 19 Op. Atty. Gen. 293, 368 (1889); 17 *Ibid.* 242 (1881) 17 *Ibid.* 333 (1882).

34 In the light of history the contrary view expressed by Atty. Gen. Black in 1860, 9 Op. Atty. Gen. 516, has clearly been repudiated.

Army Regulations 500–50, June 6, 1923, show the attitude of the executive branch of the government. "In the enforcement of the laws troops are employed as a part of the military power of the United States and act under the orders of the President as Commander in Chief. They can not be directed to act under the orders of any civil officer. The commanding officers of troops so employed are directly responsible to their military superiors. Any unlawful or unauthorized act on their part would not be excusable on the ground of an order or request received by them from a marshal or other civil officer."

35 (1871) 13 Wall. 397.

36 Art. II, § 8.

37 At least in time of peace. See the 74th and 92d Articles of War. In Kahn v. Anderson (1921) 255 U. S. 1, the Supreme Court held that

tary law is carefully to be distinguished from "martial law" over civilians generally.

Judges of high authority have on occasion made remarks that have confused this point. Starting from the admitted premise that as used by Coke, Hale, Blackstone, and in the preamble of the British Mutiny Act,[38] martial law meant military law, they have been led to deny that it could have any other meaning. Thus when General Jackson's proclamation of martial law at New Orleans came before the Supreme Court of Louisiana, Derbigny, J., said that

> The proclamation of *Martial Law* . . . cannot have any other effect than that of placing under military authority all the citizens subject to military service.[39]

Another judge who helped to confuse this matter was Lord Chief Justice Cockburn in his charge in the Jamaica case. A colonial statute had authorized the governor in the event of certain emergencies to put martial law in force. The chief justice had to instruct the jury what this statute meant. He concluded that the only martial law properly so called known in England was the law applicable to military duties, and continued: "Now, if such be the law as applied to the soldier, why should it not be the law applicable to the civilian."[40] Thereupon he proceeded to inquire whether a military court which had condemned an alleged rebel had been constituted ac-

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a court-martial had jurisdiction to punish in the case of a murder committed by a person subject to military law within the United States in time of war.

[38] 1 Wm. & Mary, c. 4 (1689). Stephen's Commentaries, 17th ed., I, 254; J. A. G. Sir David Dundas, M. P., before the Select Committee on Ceylon, Second Report, 12 Parl. Papers (1850) Question 5445.

[39] Johnson v. Duncan (1815) 3 Martin 530, 551. Cf. State v. Davis (1816) 4 N. J. L. 311.

[40] Queen v. Nelson and Brand (1867) F. Cockburn's Report, 99.

cording to the articles of war, and whether the evidence on which it acted was admissible and sufficient.

Now it is evident that all this is beside the point and leads to no useful end. The articles of war are expressly addressed to soldiers; the offences forbidden are military offences—desertion, mutiny, insubordination, etc. Military law makes nonsense if attempted to be applied to rebels or insurgents. For an executive to proclaim "martial law" certainly does not signify that the articles of war are to be applied to civilians, and military law affords little aid in deciding what may lawfully be done in such an event.

§ 14. Martial Rule Distinguished from Military Government. The subject of this study must also be differentiated from military government—a distinction the Supreme Court has recognized but not always kept in mind.[41] When our forces occupy hostile territory and establish there a military government, the commander is not hampered with respect to the measures taken against the inhabitants by the limitations of the Constitution.[42] Nor is the situation different, in this respect, where the enemy consists of citizens in rebellion after the government has recognized their belligerency.[43] When an in-

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41 Thus in United States v. Diekelman (1875) 92 U. S. 520, and in Dow v. Johnson (1879) 100 U. S. 158, it employs "martial law" to describe the government exercised by General Butler at New Orleans in 1862, that is, at a time when the belligerency of the Confederate States had been recognized and when New Orleans was occupied hostile territory.

42 "We . . . do not look to the constitution, or political institutions of the conqueror . . . for the rules by which the powers of such government are regulated or limited." Halleck, International Law (Baker, ed.) II, 444, cited with approval in Dooley v. United States (1901) 182 U. S. 222, 230.

43 "The Constitution . . . guarantees no *rights*, but only declares the *liabilities*, of public enemies." Whiting, War Powers under the Const.,

surrection has ripened into war, and has been recognized as such by the constituted authorities, the inhabitants of the hostile territory become public enemies, beyond the pale of constitutional protection.[44] In this situation the commander is the supreme law-giver, executive, and judge, subject only to the restraints imposed by the laws and customs of war, the orders of superior authorities, public opinion, and his own conscience.[45] In this sense military government is the will of the general.

The restoration of peace does not automatically terminate a military government.[46] It remains until Congress has provided a substitute. But the return of peace will restrict the commander's authority;[47] he will exercise administrative power limited by the general and constitutional laws of the country under whose authority he acts.[48] For some years after the close of the Civil War Congress maintained a military form of government in the Southern States,[49] and in so doing was held to be exercising a discretionary power conferred by the guaranty clause of the Constitution.[50] The Supreme Court de-

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43d ed., 292–3. But rebels become liable in addition to the penalties for treason. The Prize Cases (1862) 2 Black 635, 667.

44 Mrs. Alexander's Cotton (1864) 2 Wall. 404; Ford v. Surget (1878) 97 U. S. 594, 604; New Orleans v. Steamship Co. (1874) 20 Wall. 387, 393; Ex parte McDonald (1914) 49 Mont. 454.

45 Dow v. Johnson, *supra*, at 166; 8 Op. Atty. Gen. 365, 369 (1857).

46 Cross v. Harrison (1853) 16 How. 164; Leitensdorfer v. Webb (1857) 20 How. 176; Burke v. Miltenberger (1873) 19 Wall. 519; Dooley v. United States (1901) 182 U. S. 222; Santiago v. Nogueras (1909) 214 U. S. 260.

47 Dooley v. United States, *supra;* Lincoln v. United States (1905) 197 U. S. 419, 429; Santiago v. Nogueras, *supra.*

48 Willoughby, Const. Law, 2d ed., III, § 1040; Magoon, Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States, 19.

49 Acts of Congress of Mar. 2, 1867, 14 Stat. 428; of Mar. 23, 1867, 15 *ibid.* 2; of July 19, 1867, 15 *ibid.* 14.

50 Texas v. White (1868) 7 Wall. 700.

clined to interfere,[51] and even where a specific act of a military commander was viewed adversely by the Court it was because Congress had not purported to confer such power.[52] This regime has been called "Congressional martial law,"[53] and it is said that in such a situation the military authorities "can be endowed by Congress and the executive only with such powers as may be exercised at any time and in any place under the doctrines of 'martial' . . . law. In short, their extent is measured by the necessity for their exercise."[54] But it is not believed that the practices of the military governments maintained by Congress during reconstruction could safely be relied upon as criteria for the conduct of martial rule; only the most dire necessity would justify measures so extensive.

§ 15. Martial Rule Differentiated from the Suspension of the Writ of Habeas Corpus. There is an intimate relation between martial rule and the suspension of the writ of habeas corpus. Where martial rule prevails the military authority will claim and exercise, *inter alia,* the power of arrest and detention without warrant. The means of inquiring into these acts is by the writ of habeas corpus. When the privilege of the writ is suspended, this restraint upon military action is removed. Whether the suspension of the writ is affirmative author-

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51 Mississippi v. Johnson (1866) 4 Wall. 475; Georgia v. Stanton (1867) 6 Wall. 700; Dunning, Essays on the Civil War and Reconstruction, 127 ff.

52 Raymond v. Thomas (1875) 91 U. S. 712. Whether Congress could have done so the Court did not have to decide.

53 Birkhimer, Mil. Govt. and Martial Law, c. 23. Col. Winthrop says "the name 'martial law' was sometimes, I think inaccurately, applied to the status of military government in the insurrectionary States." Military Law, 2d ed., II, 1245 note.

54 Willoughby, Const. Law, 2d ed., III, 1583. The language is based on the opinion in Dooley v. United States (1901) 182 U. S. 222.

ity for arrest without warrant, or whether on the contrary, the suspension detracts nothing from the obligation of the IV Amendment (or, in State cases, of the similar provisions of the State constitution), has not always been free from doubt.[55] No doubt the latter view, held by the majority in the Milligan case, would now be generally accepted as correct.[56] At any rate while the writ is suspended the executive will be able to exercise an arbitrary rule. This temporary and partial exemption from judicial review greatly facilitates martial rule. At the outbreak of the Civil War Professor Parsons stated to the Harvard Law School:

> It may indeed be said that, for all practical considerations, martial law and the suspension of the right to *habeas corpus*, are one and the same thing.[57]

His colleague, Professor Joel Parker, amended this pronouncement:

> The existence of martial law and the suspension of the *Habeas corpus* have been said to be one and the same thing; but in fact the former includes the latter and much more.[58]

The latter statement is preferable. The suspension of the writ of habeas corpus does not of itself inaugurate martial rule. It would be quite possible for the executive to continue to act through civil magistrates. Moreover, in some instances in the United States martial rule in a qualified degree has in fact existed and been upheld by the courts even though the writ of habeas corpus was, in legal contemplation, not suspended. For the fact that the writ is available does not mean that it will issue at

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55 Ex parte Milligan (1866) 4 Wall. 2.
56 Willoughby, Const. Law, 2d ed., III, 1612.
57 3 Western Law Monthly 331 (1861).
58 93 No. Am. Rev. 493 (1861).

the prayer of every petitioner. The writ of habeas corpus issues of right, but not of course, for the petition must show adequate cause.[59] As Justice Harlan said for the Court in another connection,

> The writ need not . . . be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison.[60]

Suppose the governor has proclaimed that an insurrection exists and has directed the militia to suppress it; the military authority is holding an individual without a warrant. On habeas corpus proceedings the respondent will cite the provisions of law directing that insurrections be suppressed. In a number of recent cases of this nature the courts have denied the petition, holding that while the governor could not suspend the writ of habeas corpus, nevertheless the petition did not state facts which at the moment entitled the petitioner to the relief sought.[61]

Finally, while arrest and detention without warrant constitute an important feature of martial rule, they are not its only manifestations. Limitations on the right of assembly, a curfew order, a search for and seizure of weapons are other typical characteristics. These measures have no relation to the writ of habeas corpus and could not be justified on the ground that the writ was suspended.

§ 16. **Degrees of Martial Rule.** If, as alleged, "martial law" is a condition wherein the will of the general supersedes the law of the land, it would seem incorrect to

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59 Hurd, Habeas Corpus, 2d ed., 218 ff.; Willoughby, Const. Law, 2d ed., III, § 1055.

60 Ex parte Terry (1888) 128 U. S. 289, 301.

61 In re Boyle (1899) 6 Idaho 609; In re Moyer (1905) 35 Colo. 154 and 159; Ex parte McDonald (1914) 49 Mont. 454.

speak of it as being subject to any qualification. But this alarming characterization is not universally true. When the President or governor has recognized by his proclamation that an insurrection is in progress, a federal or State force will be sent in and become the means by which order is restored. The commander becomes the agent by which the chief executive exercises his functions.

This situation lies far short of absolute military power, and yet is something more than acting in obedience to the precept of a local magistrate. In a number of cases the courts have referred to it as qualified martial law.[62]

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62 "The action of the governor . . . has the effect to put into force, to a limited extent, martial law in the said county." In re Boyle (1899) 6 Idaho 609.

"The issue of General Order No. 39 [calling for the mobilization of State troops to suppress riot and tumult in certain mining counties] by the governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or at least, according to the more moderate advocates of that view, not in time of peace. . . . Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property." Com. v. Shortall (1903) 206 Pa. St. 165.

"Martial law, however, is of all gradations, and although the governor cannot, by proclamation or otherwise, establish martial law of the [punitive] character above described, he is not barred from declaring it in any form. We must therefore assume that, in using that phrase in his proclamation, he meant only such degree or form of martial law as he was constitutionally authorized to impose." Ex parte McDonald (1914) 49 Mont. 454.

A similar view is expressed in Bishop's Criminal Law:

> Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the criminal authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels.[63]

It is not for one moment supposed that these expressions will command universal approval. Some purists will insist that "martial law" and the common law are mutually exclusive; where the one prevails the other cannot. "Martial law is a thing absolute in nature."[64] "There is no middle ground or twilight zone, between government by law and martial rule."[65] Many will be disposed to agree with one of the author's correspondents who after acting as counsel in a notable case in this field remarks: "It is difficult for me to write the words 'martial rule' without launching into a philippic." He explains with candor "I cannot dispute that the present status of the law is not what I think it should be"—either on historical grounds or in regard to public policy. The author recognizes and to some extent agrees with this view. But this does not vitiate the contention that the courts do recognize a condition where some functions of government are carried on through military agencies and yet where the common law is not ousted. "Preventive martial rule" is adopted as an appropriate label; but the name is unessential. The question is, what principles

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63 I, § 502, Quoted with approval in Queen v. Bekker (1900) 17 Supreme Court Rep., Cape of Good Hope, 340, 356; also by Col. Winthrop in his Military Law, 2d ed., II, 1280 note.

64 Brief for appellees in Adams v. United States ex rel. Palmer (1928) 51.

65 Bishop v. Vandercook (1924) 228 Mich. 299.

are applicable to such a condition, and further, is the law so construed consistent with sound public policy?

§ 17. The Principles of Law Governing Martial Rule. The thesis which this book defends may be stated briefly. The common law recognizes the use of force to repress illegal force. The test applied is this:—under the circumstances, would the measures taken have appeared necessary to a man of reasonable firmness? To be sure, the criterion of what some hypothetical "reasonable man" would have done lacks objective certainty. In contrast to the French state of siege where the powers of the military are somewhat precisely defined in advance, martial rule is provisional in character. The former is more certain, the latter more flexible. In the very presence of hostilities, where civil authority has fallen away and military power dominates, summary measures may be taken which could not possibly be justified under different conditions. Even though the exigency may have silenced the courts their jurisdiction is only temporarily ousted. Sooner or later every person exercising military power may presumably be called upon to justify any act *prima facie* illegal. "It is . . . impossible to predicate of any given act done under martial law, whether it is justifiable or not, without a full inquiry into all the circumstances of the case, and the extent of the danger involved." [66] The fundamental error which, it is submitted, has characterized several recent decisions has been a failure to regard war, insurrection, and mere riot in their proper perspective.

The foregoing is far from saying that when a commander carries out martial rule he is obliged to make an heroic sacrifice which statesmen will commend but courts

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66 Solomon, J., in Queen v. Bekker (1900) 17 Supreme Court Rep., Cape of Good Hope, 340, 356.

cannot condone—that he is under a moral obligation to save his country in violation of its constitution. This might be the inference from the colorful story of Andrew Jackson at New Orleans—paying the fine imposed by the court and later securing reimbursement from a grateful nation for performing a duty that transcended the law. To be sure, the commander incurs legal hazards for any excess:

> You spoke of his being responsible afterwards for that which he has done,—said Mr. Gladstone in the Ceylon investigation;— . . . does not it seem to follow that what he has done has not been done under the law so to be called, but under a necessity which is above the law?

To which the Judge Advocate General [67] responded:

> I say he is responsible for what he has done, just as I am responsible for shooting a man on the King's highway who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible.[68]

This system of judicial control is not without its dangers. The check may be too tardy to be effective. In the British Empire its value has been undermined by improvidence in granting acts of indemnity.[69] And in any case it is subject to those human defects which to a greater or less degree judges share with ordinary mortals. What constitutes a clear and present danger justifying a departure from the ordinary course of law, as the freedom of speech cases show, is a question which judges are often unable to approach with objectivity.

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67 Sir David Dundas, M. P.

68 Select Committee on Ceylon, Second Report, 12 Parl. Papers (1850), Question 5477.

69 On the impolicy of statutes which in effect preclude a judicial inquiry into the conduct of martial rule, see Laski, Grammar of Politics, 558–9.

CHAPTER IV

INSTITUTING MARTIAL RULE IN THE BRITISH EMPIRE

> I conceive it is the better opinion that the law of England, born and nurtured in times when war within the realm was very possible, is not without resources in the face of rebels and public enemies; that a right arising from and commensurate with the necessity is a part, though an extraordinary part, of the Common Law.
>
> Sir Frederick Pollock, The Expansion of the Common Law, 105.

§ 18. Circumstances Under Which Martial Rule Has Been Instituted. Though not unacquainted with the employment of troops to aid civil authorities, Great Britain has had little first-hand experience with martial rule. It is true that during the Gordon riots of 1780 the military was ordered to act without the intervention of the civil authority—"an extreme measure, partaking in some degree of the character of Martial Law."[1] In the shock of the outbreak of war in 1914 Parliament granted power with prodigality and the government kept coming back for more. The Defence of the Realm Act (unpopularly known as Dora) as amended, consolidated and augmented gave the Crown *carte blanche* to make ordinances for the national security. This omnibus authority to control, appropriate, arrest, or punish would, if fully ex-

[1] Clode, Mil. Forces, II, 166.

ercised, have reduced the rights of the subject to the vanishing point. For the first time since the Civil War (and then for only four months) it became the law in England that a civilian might be sentenced to death by court martial. In February, 1915, the Attorney General remarked in the House of Commons that the first Defence of the Realm Act had "created a very unique situation"[2] and proposed an amendment which reestablished, in general, the right to a civil trial, with a saving proviso to authorize its suspension in the event of invasion or other special military emergency. Thus the war brought to modern England the novel experience of living under "martial law and something more."[3]

The history of Ireland and of the dominions and colonies beyond the seas is quite another matter. From first to last Ireland has had abundant opportunity to become acquainted with punitive martial rule. In 1798–99, 1803, 1833, and again from 1916 to 1924, all times of rebellion, government was administered through military agencies, and civilians were subjected to trial before boards of officers. Generally the military regime was authorized by statute;[4] but in 1798 martial law was proclaimed by the executive without the consent of the Parliament.[5]

Under the authority of the Defence of the Realm (Amendment) Act, 1915, martial rule was instituted in

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2 70 H. C. Deb. 5s., 288.

3 Baty and Morgan, War, 111.

4 These statutes were: 39 Geo. III, c. 11 (1799) of the Irish Parliament; 43 Geo. III, c. 117 (1803), continued by 44 Geo. III, c. 9 (1803); 3 & 4 Wm. IV, c. 4 (1833); 4 & 5 Geo. V, cc. 29, 63 (1914); 5 Geo. V, c. 8 (1914); 10 & 11 Geo. V, c. 31 (1920); and of the Irish Free State: Acts No. 28 of 1923 and No. 1 of 1924.

5 When the authority of the executive to institute martial rule was challenged in Wolfe Tone's Case, (1798) 27 St. Tr. 613, the government deemed it expedient to secure legislative sanction. Clode, *op. cit.*, II, 170.

Ireland on April 29, 1916.[6] The immediate occasion was the fear of a German invasion. But the military regime was not permitted to lapse with the passing of that danger, being continued even after the armistice in order to cope with the Irish rebellion. Despite the copious powers conferred by the Restoration of Order in Ireland Act of 1920,[7] the executive and military authorities assumed even greater liberty of action by proclamation of December 10, 1920. This removed martial rule from its statutory basis to the less firm foundation of an executive declaration. When the British garrison marched away, martial rule was continued by the Free State government.

In the colonies during the nineteenth century "martial law" was invoked on a number of occasions when the white man's burden became unwieldy. The list includes servile revolts in Barbados (1816),[8] Demerara (1823),[9] and Jamaica (1831).[10] To this may be added the native revolt against taxation in Ceylon (1848) [11] and the uprisings of negro laborers in St. Vincent (1862) [12] and Jamaica (1865).[13] The attacks of border tribes called forth proclamations of "martial law" in the Cape of

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6 50 Irish L. T. 111, 139, 142.

7 10 & 11 Geo. V, c. 31.

8 Schomburgk, Hist. of Barbados, 395 ff.; Clode, *op. cit.*, II, 482; Report from a Select Committee of the House of Assembly, appointed to inquire into the origin, causes, and progress of the late insurrection, Barbados, 1816, 12.

9 23 Parl. Papers (1824) Nos. 158 and 333; Clode, *op. cit.*, II, 482–3.

10 47 Parl. Papers (1831–32) Nos. 285 and 482; Gardner, Hist. of Jamaica, 271 ff.; Clode, *op. cit.*, II, 490.

11 36 Parl. Papers (1849) Cmd. No. 1018; Second Report from the Select Committee on Ceylon, 12 Parl. Papers (1850); Clode, *op. cit.*, II, 501.

12 38 Parl. Papers (1863) No. 509.

13 30 Parl. Papers (1866) Cmd. Nos. 3683 and 15573; 51 *ibid.* (1866) Cmd. Nos. 3594 and 3681.

Good Hope in 1835, 1846, and during the period 1850–53.[14] An attempt to collect a poll tax from the Zulus of Natal in 1906 led to a race war which in turn called forth a prolonged period of martial rule over the natives.[15] Martial law was twice proclaimed in Lower Canada during the "Patriote" Rebellion of 1837–38.[16] Still other cases might be mentioned.

One of the most instructive instances of martial rule under the British flag is that of South Africa during the Boer War (1899–1902), where the executive and military authorities had to face enemies from without and rebels within. From a clumsy beginning the administration of martial rule gradually developed into an efficient system guided by a rather elaborate code.[17]

A period of labor unrest in the Union of South Africa culminated in a general strike in January, 1914. The government declared martial law and deported without trial ten of the union leaders.[18] In the following autumn martial rule was again exercised to cope with a rebellion among those Boers who opposed cooperation with the British in the World War. By the end of December General Botha had suppressed the resistance and inaugurated a policy of condonation.[19]

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14 39 Parl. Papers (1835) No. 252; 38 *ibid.* (1847) Cmd. No. 786; 43 *ibid.* (1847–48) Cmd. No. 912; 38 *ibid.* (1851) Cmd. Nos. 1334 and 1380; 33 *ibid.* (1852) No. 57 and Cmd. No. 1428; 66 *ibid.* (1852–53) Cmd. No. 1635; 38 *ibid.* (1854–55) Cmd. No. 1969.

15 79 Parl. Papers (1906) Cmd. Nos. 2905, 3027, and 3247; J. Stuart, Hist. of the Zulu Rebellion.

16 39 Parl. Papers (1837–38) No. 80; Report of the State Trials at Montreal, 2 vols.; Clode, *op. cit.*, II, 497 ff.; De Celles, The 'Patriotes' of '37; Bourinot, Canada, 351 ff.; Tilby, British North America, 365 ff.; Forsyth, Cases and Opinions, 198–9.

17 57 Parl. Papers (1902) Cmd. No. 981; Times Hist. of the War in South Africa, passim.

18 49 Parl. Papers (1914) Cmd. No. 7112; 59 *ibid.* (1914) Cmd. Nos. 7213 and 7348; 31 South Africa Law Journ. 164; 49 L. J. 44.

19 45 Parl. Papers (1915) Cmd. No. 7874.

In the spring of 1919 the Swaraj movement, combined with various other factors, led to a state of acute political unrest throughout India. Rebellion broke out in the Punjab early in April. At Amritsar the civil authority was unable to restrain rioting, killing, and looting, and martial rule existed *de facto*. The commanding officer, General Dyer, considered it his duty to fire upon a crowd which had assembled in breach of his proclamation, killing between three and four hundred persons. Several days later the Governor General in Council, under statutory authority, proclaimed martial law throughout the Punjab. The ordinary criminal courts were suspended; punishment was administered summarily by military officers and also by martial law commissions of varied composition, whose competence was made retrospective. Martial law was withdrawn piecemeal, being continued on the railways until August 25.[20]

A period of martial rule in the colonies or dominions is followed by an act of indemnity. By such a statute the legislature declares that all acts (or more properly all bona fide acts) of the authorities shall be deemed lawful, and that no action, civil or criminal, shall lie against them. Sometimes a government will continue the military regime for the express purpose of awaiting this legislative sanction. The legal consequences of such a statute will be considered in a subsequent chapter.

The exercise of martial rule in a colony and even in a dominion is almost certain to evoke unfavorable comment in the mother country. Sometimes the opposition in Parliament will turn such an incident to its political advantage. This was notably the case after the Demerara rebellion. On June 1, 1824, the leader of the opposition, Brougham, moved an address censuring the

[20] 14 Parl. Papers (1920) Cmd. Nos. 534, 681.

government for the exercise of martial rule.[21] A spirited debate ensued, in which some of the best legal minds in England participated. Sir James Mackintosh, Dr. Lushington, Wilberforce, Denman,[22] and Sir Joseph Yorke spoke for the motion. The defenders of the government, who deplored but in a measure condoned the military regime, included Scarlett, Tindal,[23] Attorney General Sir John Copley,[24] and Canning. After two days of debate the government was upheld by a party vote, 193 to 146. The debate was of more than momentary importance: a grave constitutional question was discused with so much learning that many phrases have come echoing down to the present. In fact it was a source of American constitutional law, for the Milligan decision abounds in innocent plagiarisms from this debate.

After martial rule in Ceylon in 1848 the government was again attacked in Parliament.[25] A select committee of inquiry was set up, comprising among its members Sir Robert Peel, Gladstone, and Hume. Among the witnesses called was the Judge Advocate General, Sir David Dundas, M. P., whose testimony constitutes an important commentary on the law of martial rule.

The enormities which characterized the suppression of the Jamaica rebellion in 1865 produced violent repercussions in English public opinion. John Stuart Mill, Huxley, Herbert Spencer, and Goldwin Smith formed a committee and collected funds to prosecute Governor Eyre. Radicals, liberals, and the working class supported them.

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21 11 Hansard's Parl. Deb. N. S., 961 ff.; 1206 ff.

22 Afterwards Lord Chief Justice.

23 Afterwards Lord Chief Justice. He pointed out that the maxims of the common law were inapplicable, inasmuch as the colony remained under the Dutch law.

24 Afterwards Lord Chancellor Lyndhurst.

25 102 Hansard's Parl. Deb. 3 s., 938 ff.; 115 *ibid.*, 843 ff.

Men of opposite political sentiment came to the governor's support; Carlyle acted as chairman of the defence committee, to which Ruskin and Tennyson subscribed.[26] The prosecutors retained Edward James, Q. C., M. P., and Sir James Fitzjames Stephen to render an opinion on the power of a governor to declare and enforce martial law—an opinion which constitutes one of the best expositions of the accepted doctrine.[27] Two military subordinates, General Nelson and Lieutenant Brand, were brought before a grand jury on a charge of murder for their part in the trial and execution of a civilian. The charge delivered by Lord Chief Justice Cockburn was distinctly unfavorable to the military officers, but the jury refused to indict.[28] Governor Eyre escaped the hazards of prosecution for murder and for offences against the Colonial Governors Act. In the latter case the charge was delivered by Justice Blackburn, and the grand jury ignored the bill. A few days later, speaking from the Queen's Bench, the Lord Chief Justice took exception to some of the passages in Justice Blackburn's charge, and almost raised a question of veracity. Thus even the judges fell to quarreling over what at bottom was probably a difference in attitude.[29] Governor Eyre was defended by that "most uncompromising of tories"[30] H. S. Giffard, who later, as Lord Chancellor Halsbury, rendered the momentous opinion in the Marais

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26 Sketch of Eyre in Dict. Natl. Biog., 2d Supp., I, 641.

27 Forsyth, Cases and Opinions, 551; Stephen, Hist. Crim. Law, I, 207.

28 Queen v. Nelson and Brand (1867) F. Cockburn's Rep. Lord Sumner once pronounced this "a masterly disquisition upon the whole field of martial law." Dict. Natl. Biog., IV, 636. But in tone it is certainly far removed from that deference to the judgment of "the man on the spot" which Lord Sumner later advocated in the debate on the Amritsar disturbances. 41 H. L. Deb. 5s., 322 ff.

29 The Judicial Conflict, 3 L. J. 398.

30 Dict. Natl. Biog. 1912–21, 210.

case. Last of all the governor was sued in tort for having imprisoned a subject. He pleaded the local act of indemnity, and was upheld in the Queen's Bench and on appeal in the Exchequer Chamber.[31] After another long debate Parliament repaid the governor's legal expenses. So ended one of the *causes célèbres* in the history of martial rule.

During the Zulu revolt of 1906 Ramsay MacDonald did not fail to point out the essential partiality of the proceedings by which the government of Natal punished the natives implicated.[32] The Colonial Secretary intervened to arrest the execution of death sentences, whereupon the local ministry resigned and the governments of Australia and New Zealand made common cause against Westminster. The Colonial Secretary was forced to recede.[33] Again when the Cape government deported the strike leaders in 1914 Mr. MacDonald moved an amendment praying that assent to the bill of indemnity be reserved pending a judicial inquiry into the proclamation of martial law. In reply the Colonial Secretary recalled the sensitiveness of responsible governments in this matter. The motion was rejected, 214 to 50.[34]

The Amritsar disturbances gave another occasion for threshing out the law of martial rule. Lord Hunter's commission of inquiry found that General Dyer had used needless severity in stamping out the rebellion. The government was anxious to facilitate the Chelmsford-Montagu reforms, and after some delay decided to place the general on half-pay. Both Houses of Parliament held long debates on the question. Lord Justices Finlay and

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31 Phillips v. Eyre (1869) L. R. 4 Q. B. 225; (1870) L. R. 6 Q. B. 1.
32 155 Parl. Deb. 4 s., 245 ff.
33 79 Parl. Papers (1906) Cmd. No. 2905, 25–39.
34 58 H. C. Deb. 5s., 353, 377, 428.

Sumner and others spoke in defence of "the man on the spot." The government replied with its heaviest counter-batteries. Labourites took up a position from which to enfilade: of course the general was wrong, but, as he had been only an instrument of the Indian Government's will, the Viceroy and civil governor should be recalled and tried. In the House of Lords the government was censured. Subsequently Sir Michael O'Dwyer, former lieutenant governor of the Punjab, brought a libel suit against an Indian who had charged him with responsibility for atrocities at Amritsar. The plaintiff recovered damages. In summing up Mr. Justice McCardie discussed the principles which should govern troops in suppressing rebellion, and expressed the opinion that General Dyer had acted properly.[35] From this opinion the Secretary of State for India hastened to dissent, reaffirming his approval of the rule of using "the minimum force necessary" as opposed to General Dyer's view that death might be meted out merely to create a moral effect throughout a rebellious area.[36]

§ 19. Martial Rule Instituted by the Legislature. Under the British flag martial rule has been inaugurated in three ways: by act of legislation, as in Ireland in 1799, 1803, 1833, and 1920; by the executive, pursuant to authority previously conferred by statute, as in Jamaica in 1865; and by the executive without such legislative sanction, as in South Africa during the Boer War.

Under a constitution where the legislature is in law omnipotent there are few legal difficulties incident to a statutory declaration that government, even including

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35 The report of O'Dwyer v. Nair must be gleaned from the press; see the London Times, May 1—June 6, 1924.

36 London Times, Aug. 28, 1924.

the administration of justice, shall be carried on through military agencies.[37] Though such an enactment might go to lengths unprecedented in parliamentary annals, it would none the less be the law of the land. For example, the Act for the Suppression of Rebellion in Ireland in 1803[38] gave authority to punish rebels "according to Martial Law, either by Death or otherwise," as should seem expedient to the commanding officer; no act done in pursuance of the statute should be questioned in any court of law; the writ of habeas corpus was suspended. Martial rule more absolute than this can scarcely be conceived. Yet the courts had no alternative but to bow to the will of Parliament.[39] They do, however, construe such legislation as covering no act of wanton oppression perpetrated under the guise of suppressing rebellion.[40]

§ 20. **Martial Rule Instituted by the Executive Under Statutory Authority.** It is one thing to pass a law to meet a present emergency, and quite another to delegate this power to the executive in advance. Prior to 1867 it was the law in a number of colonies that in case of rebellion or invasion the governor should in his discretion declare martial law.[41] Legislative assemblies controlled by the property-owning class were quite willing to authorize "a despotism for the time being" in the event of domestic disorder. Sometimes this discretionary power led to inhuman severity—notably in Jamaica in

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37 Birkhimer, *op. cit.*, 395; Bowman, 15 Mich. L. Rev. 93 at 116 ff.

38 43 Geo. III, c. 117.

39 The King (O'Connell) v. Military Governor [1924] 2 Irish Rep. 104, 112; The Queen v. Nelson and Brand, 53 ff.

40 Wright v. Fitzgerald (1799) 27 St. Tr. 759; Birkhimer, *op. cit.*, 397 ff.

41 38 Parl. Papers (1863) No. 509, 151; Martial Law Instructions, Colonial Office, Jan. 26, 1867, in 79 Parl. Papers (1906) Cmd. No. 2905, App. I, 56.

1865. Soon thereafter the Colonial Office requested the repeal of any local statutes of such nature.[42] It is contrary to British constitutional practice for the legislature to authorize in advance the suspension of the ordinary law.

But where a statute confers upon the Crown authority to resort to martial rule when necessary, the decision of the executive is conclusive. Thus in proposing the Defence of the Realm (Amendment) Act, the Attorney General pointed to the proviso for abolishing civil trial in case of military emergency, and said "I may be asked who is to decide whether or not . . . the Proclamation suspending the operation of the Statute is to be made. There is only one possible answer to that question. Of necessity the Executive must decide that; nobody else can decide it."[43] And in charging the grand jury in Governor Eyre's case, Lord Justice Blackburn laid it down that the Governor had exercised a discretion conferred by law; if he had exercised that discretion in good faith, he was not liable, even though he might have erred in his decisions. The jury would put themselves in the governor's place, viewing events in the light in which he had seen them, and would say whether they believed that the governor had abused his power.[44]

It must be borne in mind that there is a distinction between justification for instituting martial rule and justification for individual acts which are subsequently committed as incidents thereto. The proclamation might be legal, yet the subsequent conduct of the authorities be culpable. The latter is in fact the more important question, and it is on this point that the cases usually turn.

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42 Clode, *op. cit.*, II, 666; 43 L. T. 122.

43 70 H. C. Deb. 5 s., 290.

44 Charge, 77 ff.

§ 21. Martial Rule Instituted Without Legislative Authority. In the event of an overwhelming emergency the executive may consider that it is practically compelled to adopt summary measures without awaiting legislative sanction. Thus the question arises, does the constitution endow the Crown with a discretionary authority to institute martial rule? Two rival theories have been advanced in answer. On the one hand it has been contended that there is a royal prerogative to proclaim martial law. According to this view certain emergencies will call to life a power inherent in the Crown to supersede the ordinary law by martial law. For errors of judgment in making such a declaration the representative of the Crown might be censured by the Government or by Parliament, but would not be amenable to the law courts. On the other hand it is contended that the Crown has no option, in meeting an emergency, to substitute arbitrary power for the ordinary law. This principle is consecrated by the Petition of Right. In time of disorder the Crown has only the common law right, shared by sovereign and subject, to restore peace even by the use of force. What is done can be justified, if at all, only in the common law courts, and on the basis of necessity (contrasted with a royal discretion) which will justify what in reason it has compelled. Under the prerogative theory it has been said that the fact of a proclamation would be the sole determinant of the legality of martial rule;[45] from the opposite point of view the proclamation is merely a notice, without legal effect.

The materials with which the case for the prerogative is built are not numerous. Down to the Petition of Right

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45 Finlason, Treatise on Martial Law, 55. Finlason was an outspoken champion of Gov. Eyre, and his writings, which L. C. J. Cockburn singled out for especial condemnation in his charge, constitute the most extreme expression of the case for the royal prerogative.

sovereigns did, *de facto,* suspend the ordinary law and proceed against the objects of their displeasure with arbitrary power, dubbed martial law. As has been seen, the Petition did not meet this situation in as explicit and comprehensive language as one might wish. And Parliament has more than once referred to "His Majesty's undoubted prerogative" to exercise martial law.[46] This has been hailed as a declaration in favor of the prerogative theory,[47] and seems to have convinced so able a lawyer as Francis Hargrave.[48] But the words are in a saving clause and so are far from declaring affirmatively that any such prerogative exists. Men of high authority have construed them to mean merely that the Crown may attack rebels as it would an army of invaders.[49]

There is little doubt today that the prerogative theory is discredited. It is the generally accepted view that the only martial law recognized by the law of England is not distinguishable from "the common law duty which is incumbent on every man, and especially on every magistrate, to use any degree of physical force that may be required for the suppression of a violent insurrection, and which is incumbent as well on soldiers as on civilians, the soldiers retaining during such service their special military obligations."[50] No doubt the degree of authority of a general warding off invaders would be far

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46 The Irish Parliament in 39 Geo. III, c. 11 (1799); the Parliament of the United Kingdom in 43 Geo. III, c. 117 (1803) and 3 & 4 Wm. IV, c. 4 (1833).

47 Finlason, Commentaries upon Martial Law, 57.

48 Jurisconsult Exercitations, I, 399.

49 The law officers, Sir John Campbell and Sir R. M. Rolfe, to the Colonial Secretary at the time of the Patriote Rebellion in Canada, Forsyth, Cases and Opinions, 198; Clode, *op. cit.,* II, 499; Sir James Fitzjames Stephen, Hist. Crim. Law, I, 221; Forsyth, 556.

50 Stephen, Hist. Crim. Law, I, 214.

greater than that of a constable quelling a riot.[51] If one examine the dicta which may be culled out of the law books about the legality of repelling force by force, or of entering on private land to build bulwarks against invasion, it is made evident that this is a right shared by king and subject—"a thing for the commonwealth every man may do without being liable to an action."[52] Now as Lord Parmoor remarked in a celebrated case on the prerogative in war-time, "A right common both to the Crown and all subjects is not in the strict sense a prerogative right of the Crown. Royal Prerogative implies a privilege in the Crown of a special and exclusive character."[53] No one would now be disposed to go farther than Lord Halsbury whose work on The Laws of England, after reviewing the rival theories, concludes:

> There does not seem to be much practical difference in the consequences of holding one view or the other. On either view the powers of the Crown and its officials are limited both as to their extent and their duration by the necessity of the case.[54]

§ 22. **Decision as to the Existence of a Necessity for Martial Rule.** Everyone would agree with Lord Halsbury that martial rule is justified only in case of necessity. But who is to judge? In the first instance it will be the executive, when it becomes evident that the ordinary means of law enforcement are inadequate.[55] In

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51 Dicey, *op. cit.*, 543.

52 The Saltpetre Case, 12 Rep. 12.

53 De Keyser's Royal Hotel v. The King [1920] A. C. 508 at 571. Blackstone's Commentaries, Cooley's 2d ed., I, 239.

54 VI, 402 note.

55 The fact that the troops are continually being summoned as a posse is not itself a justification for resorting to martial rule: The King (O'Brien) v. Military Governor [1924] 1 Irish Rep. 32.

taking such a step the executive officer acts at his peril; he must be prepared to make his peace either with the legislature or with the courts. The proclamation will not be accepted as conclusive. This does not mean that the courts will interfere *durante bello* with military operations—it is now pretty clear that they will not.[56] But they will form their own judgment as to whether the circumstances are such as to render martial rule lawful. This was frankly stated by Prime Minister Asquith in speaking of martial rule in Ireland:

> Either there does or there does not—that is a matter for the Courts to decide—exist a state of things which justifies the suspension of the ordinary law.[57]

The attitude of the courts will appear in the examination of a number of cases. Standen v. Godfrey [58] was the first of a long line of cases on martial law in South Africa. In an obiter dictum Chief Justice Wylde expressed his opinion that the proclamation of martial law *ipso facto* stayed the civil judicature;—that is to say, he was prepared to accept the decision of the governor without inquiry. This dictum was not followed in the case In re Kok and Balie [59] where the court ordered the release of native rebels after the termination of hostilities, the order of the executive to the contrary notwithstanding. With the outbreak of the Boer War the courts were

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[56] Elphinstone v. Bedreechund (1831) 2 St. Tr. N. S. 379; Buchanan, J., in Re Fourie (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 173, 179, and The Queen v. Bekker (1900), *ibid.* 340, 350; Ex parte Marais [1902] A. C. 109; The King v. Allen [1921] 2 Irish Rep. 241; The King (Garde) v. Strickland [1921] 2 Irish Rep. 317; The King (Johnstone) v. O'Sullivan [1923] 2 Irish Rep. 13; The King (Childers) v. Adjt. Gen. [1923] 1 Irish Rep. 5; The King (O'Brien) v. Military Governor [1924] 1 Irish Rep. 32.

[57] 82 H. C. Deb. 5 s., 958.

[58] (1851) 1 Searle, Supreme Court of Cape of Good Hope, 61.

[59] (1879) 9 Buchanan, Supreme Ct. of Cape of Good Hope, 45.

again confronted with martial law cases.[60] In every case the Government sought to gain judicial assent to the proposition that the proclamation of martial law was conclusive upon the courts. What the judges replied was as follows:

> I am not prepared to say that the proclamation of the Governor suspending the ordinary process of law, and putting martial law in force, will always in this Court be conclusive proof of the necessity of such proclamation, and that the Court will at no time test the legality of such proclamation. That question does not now arise.[61]
>
> Strong evidence would be required to justify the Court in going behind the proclamation.[62]
>
> Looking at all the circumstances of the case, I am not prepared to say that the general is wrong in his opinion, and that the Government is wrong in maintaining martial law.[63]

Martial law cases also arose in the Supreme Court of Natal, where it was similarly held that the mere proclamation was not proof of the facts recited therein; the Government must submit evidence of the necessity for exercising martial rule.[64]

The same view was taken by the Irish courts when they were urged by the attorney general to concede that the Lord Lieutenant's proclamation of martial law was conclusive.[65] That this was not merely face-saving is shown by the fact that eventually a time was reached in the pacification of Ireland where the Government could

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60 See below, Art. 33.

61 Maasdorp, J., in Re Fourie (1900) 17 Sup. Ct. Rep. 173.

62 Solomon, J., in The Queen v. Gildenhuys (1900) *ibid.* 266.

63 Maasdorp, J., in The Queen v. Bekker (1900) *ibid.* 340.

64 Morcom v. Postmaster General (1900) 21 N. S. Natal Law Rep. 32.

65 See below, Art. 36.

not convince the Court of Appeal that war or armed rebellion was still raging, with the result that a military prisoner was ordered to be released.[66]

So it appears that the proclamation of martial law does not conclude the courts, and is nothing more than a notice of the Government's intention.[67] Even though the proclamation is held to have been proper, that does not cover with a broad mantle of legality all that may have been done in the name of "martial law." In theory the necessity of what was done must be made out to the satisfaction of the courts. But in practice the legislature may be counted upon to intervene with an act of oblivion. Thus in the end the Government may arrive at about the same point as if it had been exercising a prerogative right all along.

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66 The King (O'Brien) v. Military Governor [1924] 1 Irish Rep. 32.

67 "The notion that 'martial law' exists by reason of the proclamation . . . is an entire delusion. The right to administer force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not." Lord Halsbury, in Tilonko v. Atty. Gen. of Natal [1907] A. C. 93.

"A proclamation of martial law confers no rights upon the military authorities which they would not have had in time of danger apart from such proclamation, and is looked upon merely as a notification to the inhabitants that they must submit to the new rule which has come into force in the district." Solomon, J., in The Queen v. Bekker (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 340, 355.

CHAPTER V

INSTITUTING MARTIAL RULE IN THE UNITED STATES: UNDER CIRCUMSTANCES FALLING SHORT OF WAR

"The greatest disorders and most acute outbreaks of violence in connection with industrial disputes arise from the violation of what are considered to be fundamental rights, and from the perversion or subversion of governmental institutions."

Final Report of the Commission on Industrial Relations, 96.

§ 23. Circumstances Under Which Martial Rule Has Been Instituted. In the earlier years of the republic the employment of armed force was looked upon with jealous apprehension. One of the grievances listed in the Declaration of Independence had been that the King had endeavored to render the military superior to the civil power, a danger sought to be averted in the future by various provisions in the bills of rights. When presently it became necessary to put down Shays' levelors in Massachusetts, and then the Whiskey Insurrection in Pennsylvania, the militia acted strictly in aid of the civil authority; in the latter case the army was accompanied by the federal judge and district attorney.[1] Not until 1842 did the insurgent left wing of American democracy find its career checked by a declaration of martial law.

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1 Federal Aid in Domestic Disturbances, Doc. No. 263, Sen. Doc. v. 19, 67th Cong. 2d Sess., 10, 31–2. This pamphlet summarizes the history of episodes where federal forces have been employed.

The democratization of the old Rhode Island charter was long overdue. Dorr led a popular movement to overthrow the charter government. He was resisted by military action and by a legislative declaration that martial law should be in full force throughout the State. On application being made the President declared his intention to support the charter government, and Dorr's attempt collapsed. Out of this episode grew Luther v. Borden[2] and other important cases.[3]

Toward the end of the nineteenth century the frontier between employers and workers was undergoing frequent change. From time to time hostilities occurred wherein it was deemed necessary to restore order by military power. "Martial law" has been proclaimed on so many occasions as to have become a household word. It is difficult to determine and would be tedious to relate the detailed history of these episodes. The material is considerable; by exercising one's selective faculties martial rule in time of industrial disorder may be portrayed either as the vindication of constitutional liberty or as the prostitution of public power to the maintenance of the economic status quo. To epitomize with impartiality is indeed a task.

In the summer of 1892 rioting occurred in the Coeur d'Alene mines of Shoshone county, Idaho. The mob was well armed, and inaugurated a reign of terror with which the local civil authorities were unable or unwilling to cope. The governor called upon the President for regular troops, and declared the county to be in a state of rebellion and insurrection. The President issued a proclamation commanding the insurgents to disperse.[4] Regu-

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2 (1848) 7 How. 1.

3 Commonwealth v. Blodgett (1846) 12 Metc. (Mass.) 56; Despan v. Olney (1852) Fed. Case No. 3822.

4 27 Stat. 1030.

lar troops and State militia were sent to the scene, the commander of the former being ordered to report to the governor for instructions, and to support the civil authorities in preserving the peace. On the appearance of the troops the insurgents fled. Thereupon an anomalous condition ensued, wherein the commander of the State troops, as representative of the governor, carried on martial rule, with the support of the federal troops. After a month and a half the regulars were withdrawn.[5]

Quiet was not permanently restored in Shoshone county, and after years of industrial conflict matters again became acute when $250,000 worth of mine property was destroyed in April, 1899. The governor called on the President for troops (the State militia having been taken into federal service), and declared the county to be in a state of insurrection and rebellion. The State auditor was appointed the personal representative of the governor; by his orders many persons were held without trial, a search for arms was conducted, a newspaper suppressed, and a permit system inaugurated whereby only those authorized by the governor's representative were allowed to work in the mines. In all this the regular officer in command furnished his support; thus in effect the agent of the governor directed the employment of regular troops. In the case In re Boyle [6] the State Supreme Court on habeas corpus proceedings upheld the arrest and detention by the governor's orders of one of the insurgents.[7]

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5 Federal Aid, *supra*, 190 ff.; Report No. 1999, House Rep. v. 7, 56th Cong. 1st Sess., 62 ff.; Birkhimer, Military Government and Martial Law, 3d ed., 496 note.

6 (1899) 6 Idaho 609.

7 The House Committee on Military Affairs conducted Hearings on the Coeur d'Alene Labor Troubles, and rendered majority and minority reports: Report No. 1999, House Rep. v. 7, 56th Cong. 1st Sess. Also

In the protracted struggle between the Western Federation of Miners and the mine operators of Colorado, the governor of that State found it necessary to institute martial rule in certain counties on several occasions during 1903 and 1904.[8] At one time, when public funds were lacking, the soldiers' pay was advanced by mine operators. At another time the President was requested to send regulars inasmuch as no State funds were available, but the request was denied. Features of martial rule were the suppression of newspapers and a censorship of the press; the suspension of the writ of habeas corpus by executive order, and the arrest and detention or deportation of objectionable characters; the deposing of civil magistrates; the closing of saloons; a general collection of lethal weapons; the prohibition of assemblages in the streets; the closing of non-union mines; and a curfew order. The adjutant general issued a pamphlet of "Instructions for the government of armies and troops in the field," which evidently contemplated military operations on a larger scale, since it went so far as to define spying and treason.[9] Considering the Boyle decision "an excellent precedent," the governor ordered the arrest and detention of Moyer, president of the miners' federation. This was upheld in the State Supreme Court;[10] and when Moyer later sued Governor Peabody for damages, the Supreme Court of the United States,

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Doc. No. 142, Sen. Doc. v. 9, 56th Cong. 1st Sess.; Federal Aid, *supra*, 211 ff.; Birkhimer, *op. cit.*, 494 ff.; Berman, Labor Disputes and the President, 36 ff.

8 Commissioner of Labor Carroll D. Wright, Report on Labor Disturbances in the State of Colorado, Doc. No. 122, Sen. Docs. v. 3, 58th Cong. 3d Sess.; Berman, *op cit.*, 60–2.

9 The governor said he hoped no one would take this seriously. Wright, *op. cit.*, 213.

10 In re Moyer (1905) 35 Colo. 154 and 159.

speaking through Justice Holmes, affirmed the legality of the governor's action.[11]

In September 1913 the coal miners of southern Colorado went on strike. Being unable longer to remain in houses owned by the operators, they removed to tent colonies so located as to lie in the path of non-union miners who undertook to work in the mines. Armed hostilities at once broke out between strikers and mine guards; a condition of lawless violence ensued with which local civil authorities were unable to cope. On October 26 Governor Ammons directed the adjutant general to mobilize the militia and proceed to the scene, "acting in conjunction with, or independently of, the civil authorities." Martial rule ensued, during which strikers and agitators, including "Mother Jones," were arrested and held without trial. A writ of habeas corpus was sued out and it appeared that the State Supreme Court would have occasion to reconsider its position in the Moyer case. But two days before the writ was returnable the petitioner was set at liberty.[11a] In April 1914 the militia was demobilized, leaving only 34 men on police duty at Ludlow, the largest tent colony.

On April 20, 1914, a pitched battle was fought between the armed strikers and these militiamen, resulting in the rout of the former and the burning of the colony. Who started the fire is still disputed; there was no question that it resulted in the suffocation of several women and children. The militia was called back to duty and scattered throughout the southern part of the State. A two-day battle was fought at Walsenburg. Riot had grown to insurrection, and was spreading rapidly. The psychological condition was such that the militia had be-

11 Moyer v. Peabody (1906) 148 Fed. 870; (1909) 112 U. S. 78.

11a New York Times, Apr. 17, 1914.

come a provocation to disorder. Some incidents of martial rule had been too reprehensible to be condoned. The governor appealed to the President to send regular troops to the scene.

On April 28 the President issued his proclamation [12] as provided in § 5300 Revised Statutes, recognizing the existence of an insurrection and warning all persons engaged therein to disperse. About 1700 regular troops were ordered to the affected districts, and on their arrival the militia was withdrawn. The instructions of Secretary Garrison constitute an important statement of the principles governing the use of federal troops in such emergencies.[13] When the regulars arrived procla-

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12 38 Stat., pt. 2, 1994.

13 "When you get upon the ground with your command, your primary duty will be to suppress domestic violence and to establish and maintain order. You will of course adopt the ordinary and proper methods with respect to those who either commit or are about to commit physical violence. You will obey the injunction contained in the proclamation and cause all persons who have been engaged in or connected with domestic violence to peaceably retire to their respective places of abode. If, in your judgment, the conduct of any individuals or corporations, either in their individual movements or in the prosecution of their business, is under the circumstances likely to lead to domestic violence and disorder, even if the said conduct is apparently lawful and would under normal conditions not be interfered with, you will immediately communicate your judgment to the department and await instructions unless the emergency is so grave that you are not justified in delaying action. You will act with the most extreme discretion and caution, so as not to cause what you are sent to prevent or allay.

"The measure of your authority is what necessity dictates. State civil functions and processes should not be displaced or interfered with when they can be successfully employed in the suppression of violence and the restoration of order. Persons arrested should ordinarily be turned over to the proper State authorities as soon as practicable. Should you find that State judicial procedure only results in the release and return to the scene of disorder of persons whose presence and conduct tend to prevent the restoration of normal conditions you may find it necessary to retain in military custody those whom you arrest. Persons

mations were issued commanding the surrender of all arms and ammunition, for which receipts would be given. The commanding officers were directed to seize those carried openly, but not to make a house-to-house search. The importation of arms was forbidden. Saloons were closed. It being the policy of Secretary Garrison that troops should lend their support to neither side in the strike, mines already running were protected but the wholesale importation of strikebreakers was forbidden. One of the commanders suggested that martial law be proclaimed, to which the Secretary replied:

> I do not know of anything that you can not do under existing circumstances that you could do any better if there was a written proclamation of martial law posted in your district.[14]

Order was gradually restored and mining resumed in Colorado. Early in January, 1915, the federal troops were withdrawn.[15]

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in military custody will be held under authority of the United States and a writ of habeas corpus issued from a State court should be met with a return declining to produce in court the body of the prisoner on the ground that he is held under the authority of the United States. In case of a writ issued from a United States court you will obey the writ, produce the body of the prisoner, and state in full the reasons for restraint, reporting the fact direct by telegraph to The Adjutant General of the Army.'' Federal Aid in Domestic Disturbances, 313.

[14] *Ibid.*, 315.

[15] New York Times beginning October 15, 1913; hearings before a subcommittee of the Committee on Mines and Mining, House of Representatives, 63d Cong. 2d Sess., entitled ''Conditions in the Coal Mines of Colorado''; the report of the above investigation, House Doc. No. 1630, 63d Cong. 3d Sess.; the Final Report and Testimony submitted to Congress by the Commission on Industrial Relations (testimony on Colorado in vols. 7, 8 and 9); Gen. John Chase, ''The Military Occupation of the Coal Strike Zone of Colorado by the Colorado National Guard, 1913–1914; ''Ludlow. Being the Report of the Special Board of Officers Appointed by the Governor of Colorado to Investigate and Determine the Facts with Refer-

The labor situation in the mines of Colorado has been a volcano whose major eruptions have occurred with a periodicity of roughly ten years. Unionism was crushed in 1914. Miners viewed the "company union" with suspicion. Thus the field was prepared for I. W. W. organizers. Under their auspices a strike was called for October 18, 1927. Among those responding were men who entered the field as strikebreakers in 1914. The strike was considered "outlaw" and the leaders were arrested. Activity grew, culminating in a march by strikers upon the Columbine mine, near Erie, in Weld county. After warning, the State police fired upon the mob, killing six. Thereupon Governor Adams felt compelled to declare the existence of an insurrection and to order several companies of the national guard to the scene. Martial rule was carried on, with the detention of the strike leaders. The legality of this action was challenged on habeas corpus proceedings in a federal court, resulting in the petitioners' release.[16] On February 19, 1928, the strike terminated.[17]

Martial rule obtained as a result of disorder and dynamiting at Butte, Montana, in September, 1914, and for some time thereafter. The governor declared that an insurrection existed and that martial law should be enforced. The resulting military regime was of large proportions, extending so far as to suspend the police court

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ence to the Armed Conflict between the Colorado National Guard and Certain Persons Engaged in the Coal Mining Strike at Ludlow, Colorado, April 20, 1914"; "Militarism in Colorado," Report of the Committee appointed at the suggestion of the governor of Colorado to investigate the conduct of the Colorado National Guard during the coal strike of 1913–1914.

16 United States ex rel. Palmer v. Adams (1928) 26 Fed. (2d) 141, 29 Fed. (2d) 541.

17 M. M. Rice, Bloody Monday Again in Colorado, Indep. 119:655 ff.; Survey, 59:357, 525, 622, 644; 60:91.

and substituting a military commission in its place. The punishment administered upon a civilian was disallowed by the State Supreme Court.[18]

During the spring of 1912 a serious dispute arose between organized miners and the operators of coal mines in the Paint Creek and Cabin Creek districts of West Virginia. A strike was declared to compel the recognition of the union and for other concessions. The owners imported strike breakers and mine guards; the strikers imported arms and ammunition. Presently fighting occurred with deaths on both sides. The sheriff of Kanawha county called for troops. Militia was sent in and after order was apparently restored was withdrawn. Thereupon a recurrence of lawlessness made it evident to Governor Glasscock that there was no stopping place between martial rule and virtual anarchy. On September 12, 1912, he proclaimed martial law in a defined zone and mobilized practically all of the militia. By subsequent proclamations the zone extended until it included about 145 square miles. These steps the governor took with great reluctance and, strange to say, at the request of the strikers and against the wishes of the operators. Martial law was declared at an end on October 14.

Fresh disorder called forth a new proclamation on November 15. This period of martial rule continued until some time in January, 1913. Its termination was marked by no proclamation. The governor believed that by allowing martial rule gradually and noiselessly to resolve itself into civil rule, the awe inspired by the former would inure to the benefit of the latter. This was a vain

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18 Ex parte McDonald and In re Gillis (1914) 49 Mont. 454; Herlihy v. Donohue (1916) 52 Mont. 601; Ballantine, Unconstitutional Claims of Military Authority, 5 Journ. of the Amer. Inst. of Crim. Law and Criminology, 718.

hope. On February 10, 1913, a third period of martial rule was inaugurated, and lasted until June 13 when the new governor, Hatfield, proclaimed its termination.[19]

Only the period of the Civil War can afford a parallel to this episode. By virtue of a State law, the governor claimed to have authority to declare the existence of a state of war. After he made such a proclamation he felt warranted in exercising war powers. The inhabitants of the proclaimed areas became public enemies, and were punished by military commissions.[20] A newspaper outside the zone was suppressed and well-nigh wrecked. In all this the governor and his subordinates were upheld by the State Court of Appeals.

The strenuous efforts of the United Mine Workers to organize the coal fields centering in Mingo county, West Virginia, led to disorder in 1920 and '21. Regular troops were sent in on the governor's request in 1920. After President Harding came into office strife was renewed,

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19 "Conditions in the Paint Creek District of West Virginia," hearings before the Senate Committee on Education and Labor, 63d Cong. 1st Sess.; Mathews, Martial Law in West Virginia. Doc. No. 230, Sen. Doc. v. 22, 63d Cong. 1st Sess.; State v. Brown (1912) 71 W. Va. 519; Ex parte Jones (1913) 71 W. Va. 567; Hatfield v. Graham (1914) 73 W. Va. 759; G. S. Wallace, in 8 Journ. of the Amer. Inst. of Crim. Law and Criminology, 406 ff.

20 General Orders No. 23 of Nov. 16, 1912, were as follows:

1. The military commission is substituted for the criminal courts of the district covered by the martial-law proclamation, and all offences against the civil laws as they existed prior to the proclamation of November 15, 1912, shall be regarded as offences under the military law, and as a punishment therefor the military commission can impose such sentence, either lighter or heavier than those imposed under the civil law, as in their judgment the offender may merit.

2. Cognizances of offences against the civil law as they existed prior to November 15, 1912, committed prior to the declaration of martial law and unpunished, will be taken by the military commission.

3. Persons sentenced to imprisonments will be confined in the penitentiary at Moundsville, W. Va.

but when the governor again asked for troops he was urged first to exhaust his own resources. The national guard was not available (due to conditions growing out of its draft into federal service in 1917). Once again the governor declared a state of war, and directed the adjutant general to suppress disorder with the posse comitatus. This rendered the "war" patently absurd, and the exercise of war powers in the premises was held to be *ultra vires* by State Court of Appeals.[21] Eventually the President was obliged to come to the rescue of the State government. On August 30 the existence of an insurrection was proclaimed.[22] After an inspection of conditions General Bandholtz reported that the insurgents, to the number of 5000, had not dispersed. Thereupon 2000 regulars were ordered in and the insurgents vanished. Those taken were disarmed and their weapons turned over to the State. Gradually the troops were withdrawn.[23]

Many other examples of the use of troops to restore order might be named. During the great steel strike in October, 1919, General Wood exercised what was termed "military control" over Gary, Indiana. Martial rule in its punitive phase was exercised by the national guard in Galveston, Texas, during the longshoremen's strike in 1920 and at Nebraska City, Nebraska, during the packers' strike in 1922. In each case the action of the military tribunal was upheld by a federal district court.[24] Texas has had a number of episodes of martial rule in recent years, the last being on the occasion of a general break-down of the civil authorities of Hutchinson county.

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21 Ex parte Lavinder (1921) 88 W. Va. 713.

22 42 Stat. 2247.

23 Federal Aid . . . , 315–6; Berman, *op. cit.*, 209 ff.

24 United States ex rel. McMaster v. Wolters (1920) 268 Fed. 69; United States ex rel. Seymour v. Fischer (1922) 280 Fed. 208.

On September 28, 1929, the governor proclaimed martial law. A number of "bad men" were incarcerated, and on habeas corpus proceedings before a district court of Texas the applicants were remanded to military custody. After the civil officers of the county and of the city of Borger had resigned and been replaced by men satisfactory to the State authorities, martial rule was terminated.[25]

§ 24. **Provisions of Federal Law.** The term "martial law" is unknown to the Constitution of the United States. Nor does it appear in the statutes, save for three acts applicable to Hawaii, Porto Rico, and the Philippines, respectively.[26] But a condition of martial rule may come into being in pursuance of constitutional or statutory provisions. Among those germane to this topic are the provision that Congress is empowered to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.[27] The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.[28] The President is commander-in-chief of the army and navy, and of the militia when in the actual service of the United States.[29] He is

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25 Letter from Asst. Atty. Gen. Page, who was legal advisor to the commander.

26 The act of Mar. 2, 1917, 39 Stat. 955, provides that the governor of Porto Rico "may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the island, or any part thereof, under martial law until communication can be had with the President and the President's decision therein made known." Like powers are given to the governor of Hawaii by act of Apr. 30, 1900, 31 Stat. 153; and to the governor general of the Philippines, act of Aug. 29, 1916, 39 Stat. 553.

27 Constitution, I, § 8, cl. 15.

28 *Ibid.*, I, § 9, cl. 2.

29 *Ibid.*, II, § 2, cl. 1.

enjoined to take care that the laws be faithfully executed.[30] The United States guarantees to every State a republican form of government and protection against invasion and, on application of the legislature or of the governor when the legislature cannot be convened, against domestic violence.[31] Then there are the various provisions of the bill of rights. Finally Congress has enacted several statutes which, in brief, empower the President to employ the army and navy and to call forth the militia to put down insurrections against federal or State authority.[32]

When a State government has exhausted its own coercive resources to maintain order and has called upon the federal government for protection, the latter must direct its own forces and cannot transfer its functions to the State.[33] Nor can any subordinate federal officer (except the governors of Alaska, Hawaii, the Philippines, and

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30 *Ibid.*, II, § 3.

31 *Ibid.*, IV, § 4.

32 Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the United States, the President judges that it is impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings, he may call forth the State militia and may employ the land and naval forces of the United States. Act of July 29, 1861, 12 Stat. 281, Rev. Stats. § 5298.

Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstruct or hinder the execution of State or Federal law as to deprive any portion or class of the people of any rights, privileges, immunities, or protection secured by federal law, the State failing to protect the same, the President is authorized to employ the militia and the land and naval forces of the United States. Act of Apr. 20, 1871, 17 Stat. 14, Rev. Stats. § 5299.

Whenever in the judgment of the President it becomes necessary to employ military forces to suppress insurrection, he shall forthwith, by proclamation, command the insurgents to disperse within a limited time. Act of July 29, 1861, 12 Stat. 281, Rev. Stats. § 5300.

33 Dig. of Opin. J. A. G., (1912), 104. *Supra*, art. 12.

Porto Rico) [34] summon on his own authority the aid of the United States army.[35]

§ 25. **Provisions of State Law.** Martial law is mentioned by name in the constitutions of seven States.[36]

From the context, as well as from the antiquity of these provisions, it would appear that martial law signified procedure applicable to soldiers. Seemingly the end sought was to secure civilians against such procedure—absolutely in three States, unless it be by legislative consent in three others, and, in Rhode Island, save "only as occasion shall necessarily require." No judicial con-

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[34] These officers are expressly authorized by Congress to call upon the commanders of federal forces to suppress lawless violence, etc.: respectively the acts of June 6, 1900, 31 Stat. 330; of Apr. 30, 1900, 31 Stat. 153; of Aug. 29, 1916, 39 Stat. 553; of Mar. 2, 1917, 39 Stat. 955.

[35] Act of June 18, 1878, 20 Stat. 152.

[36] In that of Vermont it is declared "That no person in this state can in any case be subjected to law martial, or to any penalties or pains by virtue of that law except those employed in the army, and the militia in actual service." Const. 1913, Decl. of Rights, Art. 17. Massachusetts (Const. 1919, Decl. of Rights, Art. 28. See also Amendments, Art. 48, The Initiative, II, § 2), New Hampshire (Const. 1902, Bill of Rights, Art. 34), and South Carolina (Const. 1895, I, § 27) have substantially the same provision, save that the prohibition is qualified by the exception "but by authority of the legislature."

In Rhode Island "the law martial shall be used and exercised in such cases only as occasion shall necessarily require." Const. 1842, I, § 18.

The Maryland Declaration of Rights (Art. 32) declares "That no person except regular soldiers, marines, and mariners in the service of this State, or militia, when in actual service, ought, in any case, to be subject to, or punishable by, Martial Law."

In Tennessee the constitution (I, § 25) provides "That no citizen of this State, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to punishment under the martial or military law; that martial law, in the sense of the unrestricted power of military officers, or others, to dispose of the persons, liberties, or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this State."

struction of these provisions has been found. Every constitution save that of New York enjoins that the military be in strict subordination to the civil power. In 29 States the provision regarding the suspension of the writ of habeas corpus is substantially identical with that of the federal constitution. In ten the provision is unqualified: no exception is made for rebellion or invasion. In seven others ambiguity is avoided by making it clear that only the legislature may suspend the writ of liberty, and in Massachusetts and New Hampshire that would seem to be the inference.

Some of these provisions express pious hopes. Take the provision that the military shall be subordinate to the civil power. After deciding that the governor might detain an insurgent without judicial process the Supreme Court of Colorado said:

> Nor do these views conflict with section 22 of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power. The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state and, although exercising his civil authority conferred by the law through the aid of the military under his command, he is acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens.[37]

In the Shortall case the Supreme Court of Pennsylvania declared:

> The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated and the rule of force under

[37] In re Moyer (1905) 35 Colo. 159.

> military methods is substituted to whatever extent may be necessary in the discretion of the military commander.[38]

With this language the Supreme Court of Kentucky disagreed. Its own view was that when the governor employed the militia to suppress insurrection

> he acts in his capacity as a civil officer of the State and not as commander-in-chief of its army. As the chief civil magistrate of the State, he calls out and must direct in accordance with law the movements and operations of the military forces.[39]

In Ex parte McDonald the Supreme Court of Montana expressed the view that in cases of insurrection the governor

> acts as a civil officer of the state, and that the military forces under him operate as a sort of major police force for the restoration of public order . . . [40]

It is needless to dwell on this constitutional provision. So long as the militia acts under the governor's orders it is obviously subordinate to the highest civil magistrate. Whenever a military dictator arrogates authority superior to that of the governor, then no doubt the constitution will have become temporarily unenforceable. It would then devolve upon the United States to restore a republican form of government.

In many States the constitution provides that the governor may employ the militia to suppress insurrection, repel invasion, and to execute the laws.[41] And in the statute law of practically every State is to be found au-

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38 (1903) 206 Pa. St. 165.

39 Franks v. Smith (1911) 142 Ky. 232.

40 (1914) 49 Mont. 454.

41 In Tennessee only after the legislature has declared that it is requisite for the public safety. Green v. State (1885) 15 Lea 708.

thority for calling forth the militia to suppress insurrection and for various other purposes—often by subordinate civil officers as well as by the governor. Sometimes the law adds that the governor may declare that a designated portion of the State is in insurrection. The statutes of Missouri, Nevada, and Utah purport to authorize the governor to declare "martial law." [42]

West Virginia goes still farther:

> In the event of invasion, insurrection, rebellion or riot, the commander-in-chief may in his discretion declare a state of war in the towns, cities, districts or counties where such disturbances exist.[43]

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[42] Mo. Rev. Stats. 1919, § 7363, Laws 1919 p. 503, provides: "Whenever any portion of the national guard is called out as provided in this chapter, the governor, if in his judgement the maintenance of law and order will thereby be promoted, may by proclamation declare martial law in the city or county in which the troops are serving, or in any specified portion thereof, and he may by proclamation declare such county or city in a state of insurrection."

Nevada Revised Laws 1912, § 4278 provides: "Whenever the governor shall declare martial law within any county or counties in this state, or when he shall declare any county or counties in this state to be in a state of insurrection, after the date of such declaration, and until the same shall have been revoked, the said 'Nevada State Police' shall have full and absolute power to take any and all steps necessary and proper for the preservation of life and property and the restoration of peace and order." Sec. 4282 provides that when martial law is in force, the Nevada State Police shall be subject to the rules and articles of war.

Utah Compiled Laws 1917, § 3833 provides "Whenever a portion of the militia is employed in the aid of the civil authorities, the governor, if in his judgment the maintenance of law and order will thereby be promoted, may by proclamation declare a county, city, or town, or any specified portion thereof in which the troops are serving, to be in a state of insurrection, and may proclaim martial law."

Unlike the Nevada statute, the statutes of Missouri and Utah do not state what shall be the legal consequences of a declaration of "martial law." The provision last quoted speaks of martial law prevailing at the very time that the militia is employed in the aid of the civil authorities.

[43] Code 1923, c. 18, § 92.

But laws speak only mediately, through men. Only by observing executive practice within the limits set by judges can one learn what these provisions actually mean.

§ 26. The Decision of the Executive as to the Existence of a State of Insurrection. In proclaiming that an insurrection exists in a designated quarter the President or governor exercises a discretion conferred by law, and his decision is conclusive. This principle was enunciated by the Supreme Court, speaking through Justice Story, in Martin v. Mott.[44] Mott, being a militiaman, refused to obey the President's call to active duty during the War of 1812. He was convicted by a court-martial, and brought an action to replevy goods seized pursuant to its sentence. By act of February 28, 1795, Congress had provided that in the contingencies contemplated by the Constitution it should be lawful for the President to call the militia into federal service. In holding that the decision of the President as to the existence of such a contingency was conclusive, Justice Story said in part:

> The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has

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44 (1827) 12 Wheat. 19. To the same effect in Luther v. Borden (1848) 7 How. 1.

> arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.

The same finality attaches to the declaration of a governor that a state of insurrection exists.[45]

It has been held that this doctrine does not go so far as to mean that a militiaman is bound to obey and the courts to uphold the governor's call to any action which he may be pleased to declare necessary in the military service.[46] He cannot create occasions for military service other than those contemplated by law. So the Supreme Court of Alabama held

> that when a soldier is ordered to do an act which has no relation to the accomplishment of a legitimate object—[47] in short, an act which is outside the scope of legally required or authorized action by the militia or any of its members—and the illegal or unauthorized character of the action clearly appears upon the face of the order, then there is no duty to obey the order and no penalty for its disobedience. A military man is not an automaton, and the duty to obey a superior

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45 Moyer v. Peabody (1909) 212 U. S. 78; Ex parte Moore (1870) 64 N. C. 802; Chapin v. Ferry (1891) 3 Wash. 386; In re Boyle (1899) 6 Idaho 609; Sweeney v. Com. (1904) 118 Ky. 912; In re Moyer (1905) 35 Colo. 159; Barcelon v. Baker (1905) 5 Philippine 87; Betty v. State (1924) 188 Ala. 211.

46 Betty v. State, *supra*.

47 In this case to attend the governor at the President's inauguration.

> officer is bounded by the jurisdiction and authority of the officer who commands him.

But the court was careful to qualify its opinion:

> When any branch or member of the state militia is called to arms and service within the boundaries of the state by the Governor as commander in chief, whether the order does or does not designate a purpose authorized by law, obedience by the soldier is compulsory.

In a case where the board of military auditors withheld the pay of militiamen ordered out by the governor at a time of insurrection, the Supreme Court of Washington held that

> it cannot matter, so far as their right to pay is concerned, whether there was reasonable ground for calling them out, or whether the call was formally correct or not. The first, last, and only duty of a soldier is to obey the command of his superior officer when called upon to march with his comrades.[48]

Though it is common practice for the governor to consult the local authorities before the militia is ordered to duty, this is not a necessary step.[49] Similarly the President may secure the opinion of federal officers in the district. But the opinion would be merely a personal one, and a federal court will not, on the application of a suitor, grant a certificate to the President that a state of insurrection exists.[50]

§ 27. The Legal Effect of Declaring the Existence of an Insurrection. What is the legal effect of declaring that an insurrection prevails in a given locality and of

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48 Chapin v. Ferry, *supra.*

49 Chapin v. Ferry, *supra;* Ex parte McDonald, *supra.*

50 Consolidated Coal & Coke Co. v. Beale (1922) 282 Fed. 934.

directing the troops to suppress it? In some instances the statutes make answer, to the effect that the governor may thereupon take all steps necessary to that end. Frequently, on the other hand, the statutes fail to define the legal consequences of the proclamation, thus leaving it to the judiciary to decide in particular cases whether the governor and his military subordinates have exceeded their authority.

When the question has come before the courts, they have in a number of cases replied that the effect of making such a proclamation and of ordering the military force to suppress the insurrection is to institute a qualified degree of "martial law"—qualified in that appropriate measures of repression would be legitimate, but punishment would still belong to the courts.[51] Some courts will studiously avoid the expression "martial law" but will admit the legality of certain interference with liberty and property.[52]

The executive branch of the federal government has given conflicting answers to this question. The Judge Advocate General of the Army has held that the proclamation of a state of insurrection is in effect a declaration of martial law, but that such a declaration is not essential.[53] But Army Regulations certainly do not envisage any punitive measures as an incident to the suppression of insurrection, for they conclude: "Punishment belongs not to the troops, but to the courts of justice."[54] In 1878 the President issued his proclamation declaring that in

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51 See quotations from In re Boyle, Com. v. Shortall, and Ex parte McDonald, *supra*, p. 46.

52 The decisions in the Moyer cases went far enough, in all conscience. Yet neither the State nor federal Supreme Court held that "martial law" obtained. (1905) 35 Colo. 159; (1909) 212 U. S. 78.

53 Dig. of Opin. J. A. G. (to 1901; McClure, ed.) 453.

54 A. Reg. 500-50, War Dept. 1923, III, 8 b.

New Mexico Territory unlawful combinations rendered it impracticable to enforce the laws by ordinary judicial proceedings and commanding the insurgents to disperse.[55] General Sherman was instructed to use military force against any unlawful assemblies. In a letter to the Secretary of State the governor of New Mexico spoke of this as "declaring martial law," to which the former replied:

> The proclamation referred to . . . is the proclamation of preliminary warning contemplated by section 5300 of the Revised Statutes, . . . and can not properly be considered a proclamation "declaring martial law;" it does not suspend or authorize the suspension of the writ of habeas corpus . . . [56]

The reasonable interpretation of the law authorizing the executive to proclaim the existence of an insurrection is that the troops called forth shall use every proper means of suppressing it. This may lead to a *de facto* condition which, for convenience, may be called martial rule. The essential question is not how this regime is designated, but what measures are proper in the premises.

A note should be appended as to the true meaning of Luther v. Borden.[57] Luther was suspected of aiding Dorr in his revolt; after martial law had been declared his house was entered at night by Borden and others in the military service of the charter government. Luther moved to Massachusetts and brought an action of trespass in a federal court. Borden justified by citing the declaration of martial law. The circuit court ruled *pro forma* that the justification was made out, and on writ of

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55 20 Stat. 806.

56 Dowell, Military Aid to the Civil Power, 219.

57 (1848) 7 How. 1.

error the case came before the Supreme Court, where the judgment below was affirmed. The case is often cited as one where the highest court in the United States expressly sanctioned the execution of "martial law" by a State government.[58]

What Taney said in part was

> if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.[59]

In the Milligan case the Supreme Court had occasion to construe Taney's opinion, and said:

> There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent or under what circumstances that power might be exercised by a state."[60]

In other words, although the Court did volunteer some remarks as to what measures might properly be adopted in suppressing insurrection, in its decision it was merely adhering to State laws and decisions in a case where federal courts had jurisdiction *ratione personæ*. There was of course no Fourteenth Amendment in that day.

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58 This is attributable to some of Taney's unguarded remarks and to a head note in Curtis' Decisions, which erroneously states the holding of the Court. It is otherwise in the original report by Howard.

59 At 45.

60 (1866) 4 Wall. 2 at 129.

CHAPTER VI

MARTIAL RULE AND A STATE OF WAR

> There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency which to mere insurrection are unknown. Doubtless an insurrection may become a war, as was the case with the great Rebellion; but it does not become so in the legal sense until the rebellious party assumes political form.
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> Justice Sanner, in Ex parte McDonald (1914) 49 Montana 454.

§ 28. Circumstances Under Which Martial Rule Has Been Exercised. In the subject at hand as in so many other affairs of state, Andrew Jackson made precedents. The weeks preceding the battle of New Orleans (January 8, 1815) were filled with danger. Jackson apprehended that the legislature might submit to the British, and on December 16 assumed control of the situation by placing New Orleans "under strict martial law." Acting on misinformation, the general forbade the legislature to convene. The next day this order was revoked. The governor of Louisiana took the field as commander of the militia under Jackson's orders, and this anomalous relation led to further friction between civil and military authority. Martial rule was not withdrawn after the vic-

tory over the British. Official information of the signing of peace was delayed, and Jackson refused to act upon news. The militia was held in service, and when a member of the legislature published a criticism Jackson had him tried as a spy. Federal Judge Hall granted a writ of habeas corpus in the case; Jackson replied by putting his honor in the guard house and later sent him out of the city. Immediately authentic advice of peace was received the general revoked his proclamation. Judge Hall returned to his court and fined Jackson $1000 for contempt.[1] That the original situation called for martial rule at New Orleans seems pretty evident; in maintaining it so long Jackson seems to have erred, albeit with perfect honesty of motive. This, like so many other episodes of Jackson's career, offers an exhibition of wisdom tinged with dictatorial wrongheadedness. On February 16, 1844, Congress voted to repay the fine with interest;[2] two months later Jackson died content.[3] Many years after Lincoln was able to cite this incident to Democrats who took exception to measures of martial rule under circumstances certainly less questionable than in the case of Jackson at New Orleans.[4]

During the Civil War martial rule frequently prevailed along the military frontiers and even in the interior of the two belligerent communities. Baltimore and vicinity furnish a case in point. When on April 19, 1861, the Sixth Massachusetts Militia passed through the city en route to Washington they were fired upon by a mob.[5] The civil authorities conceived it to be their duty to the

1 Bassett, Life of Andrew Jackson, 173–4, 208 ff.; Correspondence of Andrew Jackson (Bassett, ed.) II, passim.

2 5 Stat. 651.

3 Bassett, 745–6.

4 Letter to Corning, Nicolay and Hay, Complete Works, VIII, 298–314.

5 Official Records of the Rebellion, s. 1, II, 7 ff.

State to prevent further disorder by destroying railroad bridges so that no more federal troops could pass through the city.[6] For this emergency the ordinary course of judicial proceedings afforded no adequate remedy. When the State legislature met, General Scott ordered the commander of the Department of Annapolis "to watch and await their action," and if they should attempt to arm their people against the United States, to take prompt action, "even if necessary to the bombardment of their cities, and in the extremest necessity suspension of the writ of habeas corpus."[7] On the same authority the Baltimore police commissioners and marshal were taken into custody. A military provost-marshal was appointed in their stead to execute the police laws of the State with the aid of the subordinate police officers. But the commissioners ordered the police force not to cooperate, and troops were moved into the city to act in lieu of police. Without any express declaration a condition of martial rule prevailed.[8] Chief Justice Taney granted a writ of habeas corpus in the case of a disaffected citizen whom the military authorities were holding, thus bringing a clash between judicial and executive power wherein the former was obliged to bend.[9]

On June 30, 1863, when the Confederacy at flood-tide was sweeping into Maryland, the general commanding at Baltimore proclaimed martial law in that city and county and throughout the western shore of Maryland. Courts and civil officers were expressly enjoined to continue their functions, "only in no way interfering with the exercise of the predominant power assumed and as-

6 *Ibid.*, 143 ff.

7 *Ibid.*, 601–2.

8 *Ibid.*, 138 ff.

9 Ex parte Merryman (1861) Fed. Case No. 9487. This view was followed in Ex parte Benedict (1862) Fed. Case No. 1292.

serted by the military authority." The sale of arms and ammunition was forbidden, saloons were closed at night, and egress from the city made subject to permission.[10] Martial rule was never formally revoked, but terminated with the passing of emergency.[11] On April 28, 1864, the general commanding at Baltimore expressed an intention to declare martial law over the eastern shore where disloyalty was cropping out. Apparently the danger was not overwhelming. The War Department replied that martial law could be proclaimed only by authority of the President.[12]

Missouri was another border State which by reason of the disaffection of many citizens was visited with martial rule. On August 14, 1861, General Fremont issued his proclamation with respect to the city and county of St. Louis, and on August 30 assumed "the administrative powers of the State." It was expressly declared that the ordinary tribunals were to continue with their customary authority so far as it could be peaceably exercised.[13] In the latter proclamation Fremont declared the property of all Missourians who had actively aided the enemy in the field to be confiscated and their slaves to be free. All persons taken with arms in their hands were to be shot. When he learned of these proclamations President Lincoln disapproved of the measures of punishment therein ordained.[14]

When General Halleck assumed command of the Department of the Missouri he requested written authority

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10 Official Records, s. 1, XXVII, pt. 3, 437–8.

11 Dig. of Op. J. A. G. (to 1901, McClure, ed.) 451.

12 Official Records, s. 1, XXXIII, 1008; XXXVII, pt. 1, 375.

13 *Ibid.*, s. 1, III, 442, 466–7. In orders of July 31, 1861, Gen. Pope, commanding in northern Missouri, had declared his intention to set up committees of public safety charged with maintaining the peace in their respective counties. *Ibid.*, s. 2, I, 195.

14 *Ibid.*, 469.

from the President to continue the enforcement of martial law. He reported that rebels were organizing throughout northern Missouri and imprisoning and robbing Union men; he added, "I cannot arrest such men and seize their papers without exercising martial law for there is no civil law or civil authority to reach them." In reply under date of December 2, 1861, the President authorized him to suspend the writ of habeas corpus and to exercise martial law as should appear necessary to secure the public safety and the authority of the United States. Thereupon the general issued a proclamation to the effect that by authority of the President martial law theretofore declared in the city of St. Louis would continue to be enforced.[15] Although he declared his desire that civil courts loyal to the federal government should continue their functions, it became necessary expressly to enjoin this upon them.[16] Guerillas were a constant menace in Missouri, while discord ran high between moderate Union men and radicals who stirred up dissatisfaction with the administration's measures. Martial rule was continued, extending so far as to direct the conduct of elections.[17]

During 1862 and 1863 various commanders proclaimed martial law over various areas in Kentucky,[18] and on July 31, 1863, the general officer commanding the Department of the Ohio made such a proclamation applicable to the entire State, for the alleged purpose of stiffening the loyal civil government against the disintegrat-

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15 *Ibid.*, s. 2, I, 155, 230–3.

16 *Ibid.*, 165. Some of Gen. Halleck's measures of martial rule are contained in orders which appear in Moore's Rebellion Record, IV, 52, 129.

17 Official Records, s. 1, XXII, pt. 2, 357, 546, 571.

18 *Ibid.*, s. 1, XVI, pt. 2, 590; LII, pt. 1, 277, 344, 349, 411.

ing effects of a rebel invasion.[19] Again in June 1864, apprehending that during the absence of the main armies disaffected persons might be working with success, the President granted authority to a commander in Kentucky to declare martial law if necessary, and to make such arrests as seemed proper. On July 5 the President himself proclaimed martial law throughout Kentucky, declaring that civil government and the administration of justice should go on so far as was compatible with the military operations of the United States.[20] In a border State where throughout the war elections were conducted which amounted to a referendum on the policies of the national administration, it is not surprising that martial rule took on a political significance. Military officers were zealous in keeping the disaffected from voting by enforcing test oaths, and strove to support a state administration which was sympathetic to the President's conduct of the war. Elections held under such auspices were of course somewhat irregular.[21]

Under date of August 8, 1862, President Lincoln declared that the writ of habeas corpus was suspended in respect to all persons who should be arrested and detained as draft evaders, and also "in respect to all persons arrested for disloyal practices."[22] And on September 24 following he issued a proclamation reciting that disloyal persons were not adequately restrained by the ordinary processes of law, and ordering:—

> *First.* That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the

19 *Ibid.*, s. 1, XXIII, pt. 2, 572.
20 *Ibid.*, 163, 180.
21 Coulter, Civil War and Readjustment in Ky., 177, 184 ff.
22 G. O. 104, A. G. O., Aug. 13, 1862.

> United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission.
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> *Second.* That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort . . . or other place of confinement by any military authority, or by sentence of any court-martial or military commission.[23]

This proclamation was issued by what was considered to be the executive's own proper authority. By act of March 3, 1863,[24] Congress authorized such suspension of the writ of habeas corpus, and on September 15 following the President exercised this authority with respect to persons held as prisoners of war, spies, aiders and abettors of the enemy, etc.[25] In Ex parte Milligan[26] the Supreme Court held that the exercise of punitive martial rule in Indiana in the autumn of 1864 was *ultra vires.* Congress, by the act of March 3 cited above, and the amendment of May 11, 1866,[27] purported to grant a considerable measure of indemnity for acts done under orders in suppression of the rebellion.[28]

The Official Records of the Rebellion disclose numerous other proclamations of martial law issued on their own responsibility by various commanders in the field. It appears that the proclamations of September 24, 1862,

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23 G. O. 141, A. G. O., Sept. 25, 1862.
24 12 Stat. 755.
25 13 Stat. 734.
26 (1866) 4 Wall. 2.
27 14 Stat. 46.
28 *Infra,* Art. 54.

and July 5, 1864, are the only proclamations of martial law *eo nomine* ever promulgated by the chief executive of the United States,[29] though such proclamations have been expressly authorized in other cases, and martial rule in fact has still more frequently been instituted.

The Confederate States were the theater of war, and martial rule was exercised by State or federal authority on occasions too numerous to name. Sometimes this would be done by individual commanders, as by General Bragg at Memphis,[30] by General A. S. Johnston at Jackson, Miss.[31] and by General Van Dorn in the counties of Mississippi and Louisiana adjacent to Vicksburg,[32] all in 1862. Out of an exaggerated regard for State rights the Confederate government was at first loath to assume responsibility for proclaiming martial law. Occasionally President Davis set aside such proclamations made by commanders in the field. When in November, 1861, the general at Charleston, S. C., asked authority to make such a proclamation Secretary Benjamin replied: "I cannot authorize you to proclaim martial law. Let the governor take that responsibility, if found necessary."[33] "I defer to your opinion of the necessity of martial law," wired President Davis to Governor Pickens of South Carolina on April 30, 1862, adding that the local commander was being ordered to support the governor's declaration if made.[34] Eventually the President issued a number of proclamations of martial law as an exercise of the power, granted by Congress, to suspend the writ of

29 Dowell, Military Aid to the Civil Power, 238.
30 Official Records, s. 1, X, pt. 2, 298.
31 *Ibid.*, 373.
32 *Ibid.*, s. 1, XV, 771.
33 *Ibid.*, s. 1, VI, 313, 318. As to Florida, *ibid.*, 427.
34 *Ibid.*, s. 1, XIV, 486; also 489–91, 497, 504, 570, 593, 596–9.

habeas corpus.[35] In terms these proclamations went farther than those issued in the North, in that they declared the suspension of all civil jurisdiction.[36] But at times martial law was not considered as warranting the trial of civilians by military tribunal.[37]

There is a certain Procrustean simplicity in the view that martial rule negatives civil rule, and vice versa. But the experience of the Civil War shows that while this is logically plausible it is artificial. Strictly the struggle was not one of civil versus military power, but of executive versus judicial power, and of federal supremacy in States nominally loyal where sentiment was neutral if not hostile. Whether or not some commander had pronounced the words "martial law" would not alter the factual situation. In all ordinary respects the civil authorities might be as unhampered as if the words had never been uttered. But the President with the army at his command could at any time apply enough sheer power to impose his will upon other civil functionaries. When this happened martial rule was actual and obvious; at other times it was potential.

§ 29. The Distinction Between Insurrection and War. In the preceding chapter the discussion of martial rule ran in terms of insurrection. But martial rule in its greatest extent is an accompaniment of war.

It is not difficult in a general way to distinguish between insurrection and war. The former consists in the open and active opposition of a number of persons to the execution of the laws, if of a character so formidable as to defy for the time being the authority of the govern-

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35 Richardson, Messages and Papers of the Confed., I, 219–27.

36 With certain obvious exceptions, as the probate of wills and the assessment of county levies.

37 Official Records, s. 1, XV, 859.

ment, even though not accompanied by bloodshed nor of sufficient magnitude to render success probable.[38] War is the condition wherein governments contend by force.[39] Insurgents may drive out the agents of the former government and set up a government of their own instead, and may place an army in the field and wage war in a material sense.[40] In these premises it may be said that the insurgents may appropriately be recognized as belligerents. But whether, as a matter of the domestic law of the parent state, war in the legal sense exists will depend upon whether the parent state recognizes the insurgents as belligerents. It may ignore the hostile government they have set up and elect to treat them as traitors.[41]

In practice the distinction between insurrection and war is of profound importance, but has often been confused.[42] War makes enemies of the inhabitants of the contending countries. Enemies have no rights under municipal (as distinguished from international) law which the sovereign need respect.[43] West Virginia experienced insurrection during 1913–14; but the governor exercised war powers. The same is true of labor disputes in other States. Dorr's attempt to supersede the charter government in Rhode Island was an insurrection; but the Supreme Court in an unguarded moment said "It was

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38 In re Charge to Grand Jury (1894) 62 Fed. 828.

39 Westlake, International Law, II, 1.

40 There is a distinction between war in a material sense and war in a legal sense, between the recognition of a condition of political revolt and the recognition of belligerency. The Three Friends (1897) 166 U. S. 1, 63.

41 Hyde, International Law, II, 193; Wilson, Handbook of International Law, 43 ff.; Westlake, *op. cit.*, II, 2.

42 Willoughby, Const. Law, 2d ed., III, § 1048a.

43 Prize Cases (1862) 2 Black 635.

a state of war."[44] If mere civil commotion can thus be equated to war, the most vicious consequences ensue. As has been seen, the proclamation of the chief executive, State or federal, that an insurrection exists is conclusive. If this gives a legal basis for exercising war powers, it follows that the inhabitants of the designated territory become public enemies, beyond the pale of constitutional protection. The question then is, may the chief executive, by his *ipse dixit,* declare that an insurrection has become a war?

§ 30. What Branches of the Federal Government Are Competent to Recognize a State of War? We turn first to the federal government. The Constitution provides that Congress shall have power to declare war and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. By the act of 1795 Congress entrusted to the discretion of the President authority to call forth the militia for the three purposes enumerated. In no case prior to 1861 did a President presume to exercise "war powers" as an incident to the suppression of an insurrection. But the rebellion in the southern States developed unprecedented proportions, and President Lincoln declared a blockade of the southern coast, thus treating as public enemies the inhabitants of the territory in insurrection. This was before Congress had convened, and consequently prior to any legislative recognition of a state of war.

In the Prize Cases[45] the Supreme Court had to determine the legality of captures made under this executive proclamation of blockade; that is, to decide whether the

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44 Luther v. Borden (1848) 7 How. 1.

45 (1862) 2 Black 635.

President, in the absence of any declaration by Congress, was competent to recognize the existence of a state of war. In a five-to-four decision the Court held that the decision of the President was not reviewable, that by virtue of his proclamation war existed in a legal sense, placing the inhabitants of the territory outside the constitutional protections.

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.[46]

This proposition is pretty bold doctrine. Having regard to the facts of the case, the majority had no difficulty in concluding that the President's decision had been a proper one. The insurgents had expelled the federal courts, established a revolutionary government, raised armies, and waged hostilities. "As a civil war is never publicly proclaimed, *eo nomine,* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know." Foreign nations regarded the contest as a war by declaring their neutrality. The majority thought they drew support for their view from the act of Congress of May 13,

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[46] At 670.

1846, which recognized "*a state of war as existing* by the *act of the Republic of Mexico.*" Here the legislature had vindicated and ratified the conduct of the President in accepting the challenge without formal declaration of war by Congress.

Justice Nelson and three of his brothers dissented in a thoughtful opinion. They contended that

> before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of . . . the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war . . .

In the historical details of the insurrection the minority saw evidence of what might be war in a material sense. But the legal consequences of war could flow only from a declaration enacted by Congress. It was a "monstrous exaggeration" to speak of war powers as an incident to the suppression of an insurrection, for the President's power in the latter regard was derived from quite a different clause in the Constitution.

Courts and critics have shown a preference for the view that Congressional action is necessary before war may exist in a legal sense,[47] and viewed abstractly, without reference to the exigency of 1861, they no doubt have the better of the argument. But constitutional law is not logic, and the Court has decided otherwise.

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[47] Woodbury, J., dissenting in Luther v. Borden (1848) 7 How. 1; Burdick, Law of Amer. Const., 255; Willoughby, Const. Law, 2d ed., III, 1559; Perkins v. Rogers (1871) 35 Ind. 124; Ex parte McDonald (1914) 49 Mont. 454.

§ 31. May a State Wage War? The weightiest practical objection to the doctrine of the Prize Cases is that it has been grafted into State constitutional law. The duty of the governor to suppress an insurrection against the government of the State is essentially the same as that of the President to suppress insurrection against the federal government. It might seem to follow by parity of reasoning that the law expounded in the Prize Cases is equally applicable to the case of a State. This means that it would lie in the discretion of a governor to declare that an insurrection had ripened into war, and thereupon to treat the insurgents as though they had forfeited all constitutional rights. Lest so surprising a suggestion appear to envisage an imaginary danger, it may be recalled that since 1912 West Virginia has had four "wars" by proclamation of the governor, and that war powers have been claimed in Montana, Nebraska, and Texas—in the latter two cases, successfully.

May a State wage war? It is provided in the Constitution that

> No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[48]

The precise meaning of this qualified prohibition has never been determined.[49] Reference to the Articles of Confederation, to the draft of the Constitution reported on September 12, 1787,[50] as well as to the early act of

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48 Art. I, § 10, cl. 3.

49 Woodbury, J., discussed it at some length in his dissent in Luther v. Borden. In the debates in the convention in Virginia in 1788 Marshall and Madison discussed generally the military powers of a State, yet neither undertook to express an opinion as to just what "imminent danger" would authorize a State to wage war. Elliot, Debates, 2d ed., III, 389, 394.

50 *Ibid.*, I, 330.

Congress of May 2, 1792,[51] lead to the conclusion that the true intent of the constitutional prohibition is that a State may not wage war except when actually invaded or in immediate danger of invasion. Apparently an Indian invasion was the danger most immediately contemplated.

It is submitted that no governor can call into being a condition of war with its legal consequences as an incident to suppressing an insurrection. He may employ the militia to preserve order, protect life and property, and to execute the processes of the courts. How far he may go in this direction will appear below. All this proving insufficient, there remains as a last resort a call upon the national government to redeem the constitutional guarantee to protect the State from domestic violence.

In the case In re Gillis[52] the Supreme Court of Montana was asked to concede that the governor might in his discretion determine that an insurrection against the government of the State had reached such a point that he might exercise war powers—in particular to punish civilians by military commission. The court repelled this contention, and held that "only the national Congress can declare or recognize the existence of war" in a legal sense.[53]

Quite different was the view expressed by the Supreme Court of West Virginia in 1912–13. On that occasion the governor had issued his proclamation declaring that a state of war existed in a designated portion of the State. Without even raising the question, When can a

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51 1 Stat. 264.

52 (1914) 49 Mont. 454.

53 It will be noted that the court seemed inclined to adopt the view of the minority in the Prize Cases, that the recognition of a state of war lies exclusively within the field of national *legislature.*

State wage war?, the court accepted the executive declaration as conclusive.[54] Subsequent use of the pardoning power prevented these cases from reaching the Supreme Court of the United States.[55]

The view of the West Virginia court has implicitly been accepted by two federal district courts in subsequent cases.[56] But it is believed that the idea of a governor being able, on his *ipse dixit,* to place citizens beyond the protection of municipal law is erroneous, and that it would not survive the ordeal of examination in a higher federal court.

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54 State v. Brown (1912) 71 W. Va. 519, reexamined and reaffirmed in Ex parte Jones (1913) 71 W. Va. 567.

55 Mathews, Martial Law in West Virginia, Sen. Doc. v. 22, 63d Cong. 1st Sess., Doc. No. 230, 20.

56 United States ex rel. McMaster v. Wolters (1920) 268 Fed. 69 and United States ex rel. Seymour v. Fischer (1922) 280 Fed. 208.

CHAPTER VII

MEASURES OF MARTIAL RULE: TRIAL AND PUNISHMENT—IN THE BRITISH EMPIRE

> The test that I apply to determine whether war exists or no is this: Is the forcible resistance to authority so widespread, so continuous, so formidable, of such duration that the help of an army must be invoked, not merely in one or two instances, but habitually or constantly, lest the State shall perish? Tested in that way, there is no doubt that, in point of law, a state of war exists.
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> Lord Justice O'Connor, in The King (Johnstone) v. General O'Sullivan [1923] 2 Irish Reports 13.

§ 32. The Traditional British Doctrine. Under what circumstances may the military authorities punish citizens by "martial law," or to phrase the question differently, when may punitive martial rule lawfully obtain? It will be found that when this question came before the Supreme Court during the Civil War period the Court accepted what may be termed the traditional view of British jurisprudence. Since that time the courts of the British Empire have had many occasions to reconsider the theretofore accepted doctrine, and as a result have introduced profound modifications. The Supreme Court of the United States, on the other hand, has had no occasion to reconsider the view which it expressed in the Milligan case.[1] So in order to forecast what would be the attitude of our own courts if a like case arose today,

1 (1866) 4 Wall. 2.

it should be particularly instructive to observe the evolution of British jurisprudence.

It has been remarked that during the Rebellion of 1798 the Lord Lieutenant proclaimed "martial law" in Ireland. Out of the regime thus inaugurated arose the case of Wolfe Tone,[2] one of the leading cases on punitive martial rule. In his day Theobald Wolfe Tone was one of the most active of Irish republicans. During the war between France and England he espoused the cause of the revolution and was commissioned a general in the French army. He was captured while leading an expedition to land in Ireland and overthrow the British rule. On November 10, 1798, he was tried for high treason before a court-martial convened at Dublin. He pleaded guilty and was sentenced to be hanged.

On the morning when Tone was to be executed, Mr. Curran made a motion in the Court of King's Bench, on the affidavit of Tone's father, stating that Tone had been sentenced to death by a bench of officers calling themselves a court-martial.

> I do not pretend to say, observed Mr. Curran, that Mr. Tone is not guilty of the charges of which he was accused; — I presume the officers were honourable men; — but it is stated in the affidavit, as a solemn fact, that Mr. Tone had no commission under his majesty, and therefore no court-martial could have cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the great criminal court of the land. In times when war was raging when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me, while I stand upon this sacred and immutable principle of the constitution — *that martial law and civil law are incompatible;* and that the

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2 (1798) 27 St. Tr. 613.

> former must cease with the existence of the latter. . . . I move for a *habeas corpus* to be directed to the provost marshal of the barracks of Dublin, and major Sandys to bring up the body of Mr. Tone.

Lest the execution should be carried out before the writ could be prepared, the Lord Chief Justice sent the sheriff to acquaint the provost marshal that the writ was issuing, and to prevent the execution. The sheriff returned and reported that the provost marshal would obey Major Sandys, and Major Sandys would obey Lord Cornwallis. He then added that Tone had that morning attempted suicide by cutting his throat. The Lord Chief Justice made a rule to suspend the execution. After several days Tone died of his self-inflicted wound. Thus the matter was terminated without a final hearing, but since that time Wolfe Tone's case has stood for the proposition that no person, not in the military service of the King, may be tried by court-martial while the King's courts are open.

This view of the law was held by the law officers of the Crown who were called upon to give an opinion as to the legality of adopting punitive measures against the Canadian insurgents in the rebellion of 1837–38:

> When the regular Courts are open, so that Criminals might be delivered over to them to be dealt with according to Law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature . . .[3]

In the parliamentary debate on martial rule in Demerara the traditional view was expressed by Sir James Mackintosh in the following oft-quoted passage:

> The only principle on which the law of England tolerates what is called martial [law], is necessity: its intro-

[3] Clode, Mil. Forces, II, 499.

duction can be justified only by necessity; its continuance requires precisely the same justification of necessity: and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ, for that purpose, the military, which is the only remaining force in the community. While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society: but no longer; every moment beyond, is usurpation: as soon as the law can act, every other mode of punishing supposed crimes is itself an enormous crime.[4]

§ 33. **The South African Cases.** The exigencies of the Boer War put these views to the test of modern war-

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[4] 11 Hansard's Parl. Deb. N. S., 1046.

For the sake of accuracy it must be said that in the law reports of this period there is one case which derogates from the then accepted doctrine. In Elphinstone v. Bedreechund (1830) 1 Knapp 316, the facts were as follows. The members of the provisional government of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of the articles of capitulation of a fortress of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities.

Held by the Judicial Committee of the Privy Council: that the character of the transaction was that of a hostile seizure made, if not *flagrante,* yet *nondum cessante bello,* regard being had to the time, place, and person, and consequently that the municipal court of Bombay had no jurisdiction to adjudge on the subject. If anything had been done amiss, it was to the executive government that recourse should be had.

But it should be noted that the case concerned not life, but property, claimed not by an Englishman, but by an enemy, and not in a portion of the King's dominions where the common law extended *ex proprio vigore.*

fare and found them too restrictive. The British army advanced and retreated through a country whose population comprised many British subjects of Boer origin, who secretly or openly aided the cause of the Boer Republics, but when apprehended invoked the rights of a British subject.

In the case In re Fourie [5] application was made upon notice to the Attorney General and military authorities to show cause for the detention of the applicant in the prison at Hope Town, and in default of authority, to show cause why an order should not issue to discharge the applicant from custody. It appeared that Fourie was arrested in December, 1899, in the district of Herbert, tried by court-martial on a charge of enlisting and engaging in the forces of the enemy, was found guilty, and sentenced to one year's imprisonment at hard labor. Before the arrest martial law had been proclaimed in Herbert and Hope Town, and still continued there. The Attorney General informed the court that no magistrate was sitting in Herbert. The judges were unanimous in refusing to interfere at that time with the military authorities.

In arguing the case the Attorney General contended that the mere fact of the existence of martial law interrupted the free exercise of civil jurisdiction. Counsel for Fourie argued that martial law did not prevent inquiry by the court into the cause of detention. After having arrested Fourie the military authorities had no right to try him by court-martial.

The court had no difficulty in denying the application. But the three judges were not in exact agreement on some of the points raised by counsel. It was not necessary to pronounce decisively upon the government's con-

5 (1900) 17 Supreme Court Reports 173.

tention that the proclamation of martial law concluded the courts, for in this case it was evident that the district of Herbert was in the theater of operations, that the ordinary judicial machinery had ceased to function, and that the propriety of proclaiming martial law was not open to question. Justice Solomon distinguished this from Wolfe Tone's Case: had Fourie been brought to Cape Town and there tried by court-martial, the case might have gone differently. Justices Buchanan and Maasdorp pointed out that the military authorities would subsequently be liable to suit and would then be called upon to justify their acts.

The next significant case is that of Queen v. Gildenhuys.[6] The applicant had been arrested and tried on a charge of high treason. In particular, it was specified that in the theater of hostilities on November 20 he had welcomed and assisted Republican troops then invading. He now applied for an order to the military authorities to show cause why he should not be admitted to bail, and to furnish the court with copies of the proceedings taken against him. Here it will be noted the applicant did not seek relief on the ground that he had been illegally tried, but tacitly recognized the proceedings of the military tribunal, applying to the court merely for an order to admit him to bail. The relief sought was denied. So long as the necessity for martial law existed the court would not hamper the action of the military authorities.

A stronger case against the military authorities was presented in Queen v. Bekker.[7] The applicant, resident in a proclaimed district, had been arrested by the military authorities for high treason during the rebellion

6 (1900) 17 Supreme Court Reports 266.
7 (1900) 17 Supreme Court Reports 340.

and invasion. After a preliminary inquiry by a resident magistrate, sitting under military authority, he had been confined to jail and had not been brought to trial. He now applied for an order to the Attorney General and the military authorities to show cause why he should not be liberated. He denied the charges, and further denied the then present necessity of martial law in the district where he was confined. He alleged that the rebellion had ceased and the hostile forces had been driven back. On the other hand, the military authorities by affidavit certified to the court the continued necessity of martial law. An order was granted for the jailer to return to the court by what authority the applicant was being detained.

This case differed from its predecessors. Fourie had been tried by court-martial during the heat of action, and where the civil magistrates had been expelled; Bekker was held, without trial, in a district where comparative calm was restored, and the magistrates were sitting. Gildenhuys had impliedly recognized the jurisdiction of the military authorities; Bekker alleged that the necessity for martial rule had ceased, and asked the court so to declare.

In their opinions the justices went further than before in laying down the legal principles on which martial rule is based. Acting Chief Justice Buchanan referred to the dictum of de Villiers, C. J.,[8] to the effect that martial law cannot exist after the occasion giving rise to it ceases. Buchanan, J., continued:

> I would prefer to put the proposition thus: that as necessity justifies the proclamation of martial law, so also does necessity justify its continuance. I do not concur in the contention of counsel that because certain

[8] In re Kok and Balie (1879) 9 Buchanan 45.

of the Courts of law are open therefore martial law cannot exist. As we know in one part of this Colony a Court was recently actually engaged in criminal trials by jury to the accompaniment of a bombardment, and yet it was admitted that martial law was necessary and was in fact in force at the time at the same place. The Courts must not only be open, but also in the full, proper, and unobstructed exercise of their jurisdiction. Where martial law is paramount the civil judicature is stayed. The two jurisdictions cannot work concurrently. As was said by Wylde, C. J., in the case cited [9] that by the existence of martial law the process of the Court would become neutralized and the judges would no longer minister under the Royal Charter, but upon the sufferance and under the will of the Commander-in-chief. That is not a position to which the Supreme Court can with due regard to its dignity and proper functions submit. No doubt the supremacy of arbitrary force instead of the recognition of the free course of duly constituted law and order is repugnant to all judicial ideas, and will not readily be concurred in. But after all the safety of the State is the highest law, and when the necessity arises the Court must acknowledge the functions of another department of the Government, and not attempt futile and ineffectual opposition thereto.

The proclamation of the executive might not be conclusive, but it was strong evidence. And the good faith of the executive was evidenced by the fact that martial law had actually been withdrawn in some districts.

. . . Until martial law has ceased, I do not think the Court should interfere with the department of State specially charged with the safety of the country and

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9 Standen v. Godfrey (1851) 1 Searle, Supreme Court of Cape of Good Hope, 61.

> with the duty of restoring peace and order. When it has been established that martial law is necessarily in force, the responsibility for all acts done thereunder must be taken by the authorities administering it. This Court can neither grant its aid to carry it out, nor assume any responsibility for its administration. As long as martial law is necessary, the mode by which alone it can be made effective, when tested by the rules prevailing in a court of justice in times of peace, is in itself illegal. To attempt control over the acts of those entrusted with the administration of martial law, and to condemn only certain of their proceedings, would in effect be to ratify their other acts, and thus to justify the very measures which the civil law cannot tolerate. While martial law lasts it is not the time to question the validity of acts which are considered to be necessary by the authorities in charge. When the proper time does arrive, as has consistently been laid down by this Court, the persons who have committed wrongful acts, whether they be military officials or others, may be amenable to the law. That time is not the present, and therefore in my opinion no order should now be made on these applications.

Justice Maasdorp made it clear that it was his opinion that the court must decide for itself in every case whether the facts justified the exercise of martial rule. In the case before him, he felt that the need for such rule was made out.[10] Though the civil magistrates were sitting in the district, they were not in the free and unobstructed exercise of their jurisdiction. Police and civil magistrates were insufficient to preserve the peace.

> . . . . There is abundant authority for saying that there is nothing to prevent the military, while administering martial law, from allowing the Courts of law

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10 *Supra*, p. 65.

> to take cognizance of matters which do not clash or conflict with the proceedings of courts martial. The existence of such civil Courts is no proof that martial law has become unnecessary.

Justice Solomon delivered a lengthy opinion, a veritable treatise on the subject. He was not prepared to deny the necessity for martial rule, even though hostilities were not actually raging at the moment in the district where Bekker was detained. But in his opinion, this did not conclude the question. He accepted Sir James Fitzjames Stephen's proposition: necessity must be the justification for every act during martial rule.

> It is thus impossible to predicate of any given act done under martial law, whether it is justifiable or not, without a full inquiry into all the circumstances of the case, and the extent of the danger involved. But then the question must necessarily arise, by whom is the test to be applied? Is the opinion of the General in Command that an act is necessary to be deemed a conclusive answer in every case, or is it open to a Court of justice to decide this question for themselves? The case which I understand is put forward on behalf of the Crown is that as long as martial law is in force, the military authorities alone are the judges of what is necessary, and that no act done within that district by them can be inquired into by the Court until martial law has ceased to be in force. If that view be correct, then we are in this position, that however gross or unwarrantable may have been the interference with the rights and liberties of any person, the Court cannot intervene to protect him during the subsistence of martial law. In other words, the jurisdiction of the Court is ousted from the district, and where a person's liberty is interfered with, the Court is as powerless as if the writ of *Habeas Corpus* had been suspended. I must say, however, that I

> am unable to accede to that contention . . . Of course the condition of the country may be such that the Courts of justice are of necessity closed; or the particular act challenged may be an act so essentially of the nature of an active military operation, that the Court would as a matter of course accept the opinion of the military authorities as conclusive of the question. Or again the Court may in its discretion, if it deems it inadvisable in the interests of the State, refuse to allow the military authorities to be harassed by judicial proceedings while active military operations are in progress, and postpone an inquiry into their conduct until a more convenient time arrives. But where in a case like the present the acts complained of are acts intimately connected with the administration of justice, I do not think the Court is debarred, merely because martial law is in force, from satisfying itself that the acts complained of are under the circumstances proper and necessary.

Then having concluded that the proclamation of martial law did not foreclose a consideration of the case on its merits and in the light of attendant circumstances, he considered the facts in Bekker's case. He concluded that it was better not to interfere with the military authorities.

In the meantime similar cases were arising in the courts of Natal. In Umbilini v. General Officer Commanding [11] and Jacobs v. Same, the Supreme Court of Natal was asked to review the decisions of courts appointed under martial law. The Attorney General contended (as had the Attorney General of Cape Colony also) that there could be no appeal to the court from the sentence of a martial law tribunal confirmed by the general. In Natal as in the Cape, the Supreme Court de-

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11 (1900) 21 N. S. Natal Law Rep. 86.

clined to adopt this extreme contention. Leave was granted to bring the cases before the court.

Leave having thus been granted, the cases came before the court on their merits.[12] In both instances the military sentences were upheld. But it will be noted that the Supreme Court of Natal claimed the right to inquire into each case. In the latter case Mason, J., said that if he thought the martial law tribunal had not acted conscientiously or carefully, or had given its decision for the sake of making an example, he would not hesitate to set it aside.

§ 34. The Marais Case. The most important case on martial law arising out of the Boer War was that of Ex parte Marais,[13] before the Judicial Committee of the Privy Council. This was a petition for special leave to appeal from the Supreme Court of the Cape of Good Hope. The petition averred the Marais had been arrested on August 15, 1901, by the chief constable of the town of Praal (about 35 miles from Cape Town) who had no warrant and did not know the cause of arrest, but acted under military instructions. On the 18th Marais and others were removed 300 miles to the town of Beaufort West, and there detained in custody. On September 6 he petitioned the Supreme Court to release him on the ground that his arrest and imprisonment were in violation of the fundamental liberties of British subjects. It appeared from the affidavit of the jailer of Beaufort West that Marais was held for violation of the martial law regulations. Buchanan, J., had dismissed his case, and was quoted in the petition as saying that martial

12 The Jacobs Case in (1900) 21 N. S. Natal Law Rep. 157; the case of Umbilini, *ibid.*, 169.

13 [1902] A. C. 109.

law had been proclaimed in the districts of Praal and Beaufort West, and that the court should not go into the necessity nor accept responsibility for acts of the military; but if the prisoner had been kept in Praal the court might have inquired into the necessity for martial law in that district. Marais further averred that he had committed no crime; that even if he had he should have been tried before the civil courts; that Buchanan, J., himself had been announced to sit for the trial of offenders in the district of Praal on August 27, 1901.[14]

Haldane, K. C., represented the petitioner before the Judicial Committee. He stated that it was a special feature of this case that the district where the arrest was made was undisturbed, and that civil courts were exercising their normal functions without interruption. That being so, and it appearing that the ordinary course of law could be and was being maintained, a state of war

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[14] From the averment of the petition it appears that Buchanan, J., simply refused to go into the question of necessity for martial law in Beaufort West. As a matter of fact, the original application had come before Buchanan and Jones, JJ., who had before them, *inter alia*, the affidavit from the commanding officer of Cape Colony to the effect that he had made inquiries and had found a prima facie case against Marais; that there were military reasons for holding Marais; that presently he would be brought to trial, though owing to military exigencies the charges to be preferred against him could not be stated at the moment. The judges ordered the jailer to show authority by which the prisoner was held, and directed that the Attorney General be notified of the proceedings. This was in itself some inquiry into the necessity. Then the matter came on before Buchanan, J., alone. He then had before him the affidavit stating in general terms the charges on which Marais was held. Just what the learned judge said in dismissing the petition does not appear. Dodd, The Case of Marais, 18 L. Q. R. 143.

A close reading of the opinions of the justices in the earlier cases arising in 1900 shows that Buchanan, J., seemed loath to look into the justification for military acts *during the existence of martial law* while his brothers had no such compunctions, but were quite willing to probe each case to satisfy themselves of the necessity. And in Natal the supreme justices inquired into the necessity in every case.

did not exist, nor could civilians be made amenable to martial law. But even if a state of war did exist, the application of martial law must be limited to measures necessary to preserve peace and order, and did not oust the jurisdiction of the civil courts which, notwithstanding the pressure of military circumstances, still were administering the law of the land. No necessity was alleged or shown why Marais could not have been brought before a civil court. The right of the Crown so to proceed was limited by necessity, and if civil courts were open, the Crown had no power to try an offender by any other. Overpowering necessity was a question of fact to be decided by a jury.

But their Lordships reported that the petition should be refused. Lord Chancellor Halsbury recited the circumstances of the case: Marais was arrested for violation of martial law Regulation No. 14, to the effect that any subject or resident who should take arms or incite others to take arms against the Crown, or actively assist the enemy or by overt acts endanger British troops or subjects, should be liable to the severest penalties, including death, at the hands of a military court. Persons reasonably suspected were liable to be arrested without warrant and sent out of the district for trial.

The question had been argued as well as if leave to appeal had been granted, and their Lordships thought there was no need to suggest any doubt as to the law in the case by granting leave to appeal. Their Lordships were of the opinion that

> where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

Martial law had been proclaimed in the district where Marais was arrested and in the district to which he was removed. That for some purposes some courts were sitting was not conclusive that war was not raging. This had been decided in Elphinstone v. Bedreechund.[15] Doubtless difficulties arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question if a mere riot or disturbance, neither so serious nor so extensive as really to amount to war, has not been treated with excessive severity. But once let the fact of actual war be established, and there was an universal concensus of opinion that the civil courts have no jurisdiction to call into question the propriety of the action of military authorities. He then added the oracular sentence already quoted:

> The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.

This statement of the law has not commanded universal respect among members of the legal profession.[16] Indeed from what was said by some members of the Committee at the hearing of the case it was speculated that there was a dissent. But as the action of the Judicial Committee is in theory a recommendation to the sovereign, there could of course be no dissenting advice offered. Though the holding of the Judicial Committee is in form only a recommendation, it is the voice of the highest judicial authority for the dominions, and is entitled to great respect in the courts of the United Kingdom.

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15 *Supra*, p. 109, note 4.

16 Egan v. General Macready [1921] 1 Irish Rep. 265; Martial Law, 195 Edinburgh Rev. 79 ff.

The opinion of their Lordships covers three points: (1) Where actual war rages, acts of the military are not justiciable in the ordinary tribunals. (2) The fact that for some purposes some courts are permitted to sit is not conclusive that war is not raging. (3) The Petition of Right is applicable only to a condition of peace.

As a general proposition, point (1) is open to question. As it stands without limitation, it is opposed to what has generally been regarded as the law: that certainly at the close of the regime of martial rule (if no sooner) the military authorities might be called upon to justify the work of their hands. Where the courts of South Africa had declined to call the military to account, they said in effect: not in this case at this time, but later. And in practice, those who have exercised martial rule under the British flag have speedily sought indemnity from the legislature: partly, no doubt, because it was quicker, easier, and more conclusive to obtain once for all vindication at the hands of the legislature than by spreading before the courts in a number of harassing cases the evidence of necessity; partly, too, because there might have been some summary actions taken which, though bona fide, might be explained only with great difficulty before a cold judge and jury. But surely no soldier would care to stand before a court without indemnity and without proof of necessity, and merely answer that war had been raging.

No doubt this statement of the law was by implication limited to the facts in the Marais Case.[17] And as so limited it is probably not open to criticism. The Supreme Courts of Cape Colony and Natal had consistently refrained from interfering with the conduct of military

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17 When Marais' Case was cited in The King v. Allen [1921] 2 Irish Rep. 241, 256, Molony, C. J., remarked: "That must, of course, be read in connexion with the subject matter."

operations. A different attitude on the part of the Judicial Committee might have resulted in crippling the military arm. Perhaps many lawyers would have been better satisfied had their Lordships made a more careful examination of the case before deciding against the petitioner.

The proposition that war may rage even while for some purposes some courts are sitting is out of line with the theretofore accepted view: that while civil courts are sitting the Crown may try its subjects before no others.[18] But this ancient test, it is submitted, must be modified to meet the conditions of war as waged in the twentieth century. War is no longer confined to the area between two hostile camps; it exists not merely at the place where the King has raised his standard in the field. And while the instrumentalities of war increase, the courts must find commensurate powers for the military authorities. The courts will take notice of unusual dangers growing out of new methods of war.[19] The situation which obtained in South Africa, whereby civil courts followed the army as it drove out the invaders, and exercised under military ægis jurisdiction over nonmilitary offences and minor breaches of martial law regulations was an eminently suitable arrangement. If the existence of

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[18] Dodd, in The Case of Marais, 18 L. Q. R. 143, says: "It must be remembered that at the period of the Petition of Right justice was to a great extent administered by the aid of legal fictions, and there was to the then legal mind nothing revolting in the assumption of facts which were opposed to actual knowledge. The application of a general rule to exceptional facts not within the true scope of the rule seemed, at that date, a legal necessity rather than a mischievous injustice.

"General formulae and fictitious averments were machinery in common use in the Courts. At the present day the fictions have vanished, and every effort is now made to avoid applying a hard and fast general rule to any case in which its application would work a manifest injustice." At 147.

[19] In re A Petition of Right [1915] 3 K. B. 649.

these courts on sufferance was to be invoked to hamper the military authority in necessary operations, then the commander-in-chief need only withdraw his support and the processes of the court would cease to run.

The new doctrine crystallized in the Marais Case was applied to an extreme case during the native rebellion in Natal in 1906. The trials which were had by military court could not be justified on grounds of necessity, but merely as discouraging any further attempt to throw off white rule. On the day set for the execution of twelve native rebels, their case was brought before the Judicial Committee of the Privy Council, in England.[20] Counsel for the petitioners stated the essential facts of the outbreak, the proclamation of martial law, and the trials thereunder. The despatches of the governor were cited to show that the regular courts were sitting, and that the governor had desired that the murder trials should be before such courts. A state of war did not exist in Natal. Counsel for petitioners relied on the Petition of Right and Wolfe Tone's Case.

Lord Chancellor Loveburn said that as he understood it, martial law could not operate when the ordinary tribunals of the country were sitting. Lord Halsbury replied that in Marais' Case it had been distinctly laid down by their Lordships that the mere fact that the law courts were sitting did not supersede martial law.

The Lord Chancellor delivered the following judgment:

> Their Lordships thought it right to sit at the earliest moment in order to hear an application which they were informed concerned a matter of life or death.

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20 Mgomini . . v. Governor and Attorney General (1906) 22 T. L. R. 413.

> Having heard it, their Lordships are unable to advise his Majesty to grant this petition. It is not an appeal from a Court, but in substance from the act of the Executive. Evidently the responsible Government of the colony consider that a serious situation exists, for martial law has been proclaimed. The Courts of justice in the colony have not been asked to interpose, and, apart from any question of jurisdiction, any interposition of a judicial character, directed with most imperfect knowledge both of the danger that has threatened and may threaten, Natal and of the facts which came before the tribunal of war, would be inconsistent with their Lordships duties. Their Lordships will humbly advise his Majesty to dismiss the petition.

§ 35. A Sequel to the Marais Case. Just how far the Marais decision had changed the theretofore accepted principles of constitutional law was once an interesting question. The answer has since been made evident, and nowhere more clearly than in Krohn v. Minister for Defence,[21] a case arising out of the regime of martial law instituted throughout the Union of South Africa at the time of the German invasion and the rebellion in October, 1914. The Governor-General's proclamation had enjoined obedience to all regulations to be issued by the Minister for Defence, and among the regulations issued was one forbidding seditious language. A special tribunal was set up, consisting of three lawyers or magistrates. The plaintiff in this case was a resident of Pretoria, who had been arrested and confined in the local jail, being charged with seditious utterances of an aggravated character. He applied for an interdict restraining the authorities from proceeding with his trial, and from a

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21 South African Rep. [1915] App. Div. 191.

judgment dismissing his application he appealed to the Appellate Division of the Supreme Court of South Africa.

Each of the three justices recognized that if necessity was the test, the government would have a very weak case. Justice Solomon referred to the views he had expressed in The Queen v. Bekker [22] and remarked that they were to a great extent inconsistent with the law subsequently laid down by the Privy Council in Marais' case. That decision must govern, and as applied here reduced the discussion to two questions: was war actually prevailing at the time Krohn began his action, and secondly, was the establishment of the special court an act of the military authorities? An affidavit of General Smuts informed the court of the nature of the emergency and declared that speedy trial was a necessary measure for suppressing the rebellion. On the other hand the applicant cited the previous manifesto of General Botha to the effect that "the rebellion is now practically at an end" and called rather for police than military measures. That this was an optimistic view, however, was shown by the fact that on the day before Krohn made his application there had been fighting within twenty miles of Pretoria, resulting in twenty casualties among the government troops and the capture of twenty of the enemy. In the light of these facts the judges could not avoid the conclusion that war had actually been raging in the district where Krohn was arrested.

That the setting up of the special tribunal was a military measure and therefore an act which could not be inquired into *durante bello* seemed evident. It followed that the appeal must be dismissed.

The Marais case as an entering wedge had held that the fact that some courts were sitting did not negative

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[22] (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 340.

the legality of martial rule. In the instant case all the courts were open, yet that fact made no difference. The criterion is whether war is raging, and that is to be established by affidavits and the reports of skirmishes, and not by the ancient test of the courts being open.

It would appear that martial rule was becoming a rather popular prescription in the pharmacopœia of statecraft in South Africa. Reading between the lines one gathers that the justices were mistrustful, and this seems evident from the thoughtful remarks on the policy of the thing which Chief Justice Innes appended to his opinion:

> In no respect can Martial Law be regarded as a good thing; it is at the best a lamentable necessity. It imposes a great responsibility upon the executive Government; it operates with inevitable harshness in certain cases, and it saps the political fibre of the people. A retrospect of South African history during the last 15 years may well give rise to enquiry as to whether the legislature would not have done well to regularise and at the same time control the operation of the system. With the action of a military commander within the area of actual hostilities interference would be alike undesirable and impossible. But in places where there are no military operations in progress, and where yet it may be necessary to exercise special powers of supervision and control the position is very different. It ought to be possible to legislate for such localities in a way that would lessen the burden of Martial Law both for the Government and the people. The circumstances under which it may be proclaimed; the things that may be done, and—more important still—the things that may not be done, and the indemnification of those acting within the limits of the powers conferred, all these matters it should be possible to embody in a statute. One of the results would be to relieve those in authori-

ty from the temptation of retaining Martial Law after the first necessity for it had disappeared, in order to prevent the institution of civil actions pending an Indemnity Bill.

§ 36. The Irish Cases. When on April 29, 1916, martial rule was instituted in Ireland, the center of interest in criminal trials was transferred from the Four Courts to the Military Barracks in Dublin, where the court-martial sat. Until December 20, 1920, martial rule in Ireland was conducted in pursuance of acts of Parliament; therefore any measure which came within the four corners of the legislation was justified. But when the parliamentary grant was found to be insufficient to meet the exigencies of the Irish Rebellion, martial rule on a larger scale was introduced by proclamation of the Lord Lieutenant. Thereafter what was done had to be justified as in any other exercise of martial rule.

On January 19, John Allen was arrested near Tipperary for having a revolver, ammunition, and a book entitled "Night Fighting."[23] He was tried before a court of four officers and sentenced to death, subject to the approval of the reviewing authority. He commenced an action to set aside the proceedings and sentence of the military court.

General Macready, commanding in chief, filed an affidavit for the Crown. A state of open rebellion amounting to war had existed prior to and since July 1, 1920. He submitted data as to the organization and methods of the Irish Republican Army, and of the casualties suffered by his troops in the proclaimed area; martial law had been proclaimed by the Lord Lieutenant; the steps taken, including trials by military court, were necessary

[23] The King v. Allen [1921] 2 Irish Rep. 241.

to suppress the insurrection. In reply counsel for Allen urged that in part the offenses charged were not cognizable at law, and at most did not constitute a crime. For such the death sentence could not be imposed. Parliament had already grappled with the Irish question, and by the Restoration of Order Act had provided for trial by court martial with certain protections thrown about the accused. General Macready had no warrant for substituting his views for those of the legislature expressed in legislation passed subsequent to the date which the General cited as the approximate beginning of the rebellion; he must act within the provisions of the statute. The punishment inflicted must not exceed that fixed by the statute. Further, in consequence of the affidavit submitted by General Macready to the effect that a state of rebellion existed, counsel urged that this fact did not give the military any authority to inflict the death penalty except in actual conflict, hot pursuit, or attempt to escape.

In reply the Attorney General argued that the effect of the Restoration of Order in Ireland Act could not have been to reduce the power of the Crown to proclaim martial law. Parliamentary legislation was applicable to all of Ireland; could nothing further be done even in the presence of rebellion in certain districts? Where rebellion existed, the rights of the military did not end at the capture of a man; the general was not bound to send him to eternity on the spot. The mere fact of taking a man did not lessen the power to deal with him—see Marais' case.

> If you once come to the conclusion that there is rebellion or war, you cannot hold the hands of the military by any decision of the civil tribunal. You cannot tie up a soldier who is defending his country in that way. I would be in a different position if I were arguing this

case post bellum. Post bellum persons might be amenable if an Act of Indemnity were not passed.

Molony, C. J., delivered the unanimous judgment of the court. It was the duty of the court to protect the lives and liberties of His Majesty's subjects and to see that there was no deprivation contrary to law. It was equally the duty of the court, when armed insurrection existed, to refuse to interfere with the officers of the Crown in taking such steps as they should think necessary to quell insurrection. The court proposed to deal with four questions:

1. Was there a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of martial law?
2. What are the powers of the Executive Government in dealing with an armed insurrection?
3. Could the military Court act, having regard to the fact that Courts of Justice in the area were open?
4. Could the military Court impose a sentence of death, (a) having regard to the provisions of the Restoration of Order Act, 1920, and the regulations made thereunder, and the Firearms Act, 1920, which imposed minor penalties for the same offense, (b) having regard to the fact that the accused was not caught in actual conflict or fresh pursuit?

As to question (1), in view of the uncontradicted affidavit of General Macready, it was impossible to escape the conclusion that at the time of the Lord Lieutenant's proclamation and since, a state of war actually existed.[24]

In answering question (2), the court reviewed the powers exercised by the government in previous rebellions, particularly in Ireland. The conclusion reached was that the civil courts had no jurisdiction *durante*

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24 *Supra*, Art. 22.

bello over acts of the military, though in the absence of indemnity soldiers might be called to account afterwards.

Question (3) had been raised in Wolfe Tone's Case, but had remained undecided. In 1838 the Attorney General and Solicitor General had advised against the trial of Canadian rebels by court-martial while the civil courts were open. "It may, however, be doubted whether they contemplated such a system of guerilla warfare as that now described." Later came the decision in Marais' case that the fact that some courts were permitted to function was not conclusive evidence that it was a time of peace. That decision was accepted here.

As to question (4) the court remarked:

> The proceedings of a military Court derive their sole justification and authority from the existence of actual rebellion, and the duty of doing whatever may be necessary to quell it, and to restore peace and order.

The court recognized the force of the contention that since the Parliament had provided penalties for offenses in Ireland, and this subsequent to the outbreak of the rebellion, the military should keep within these statutory limits. But the general had replied that the dangers had grown since the legislature had spoken. And Parliament had been sitting, and remained silent when the executive had proclaimed martial law and declared its intention to go beyond the statutory powers provided. It was abhorrent to the spirit of the constitution to execute a man without statutory authority, or that civil and military tribunals should sit side by side and inflict different penalties for the same offence. But this was rather for the consideration of the Parliament than for the court, *durante bello*. If war exists, the military may inflict death, and the civil courts will inquire after the war.

On February 28, 1921, Allen was executed.

In Egan v. General Macready [25] the Chancery Division of the High Court of Ireland took issue with the decision of the King's Bench. On a set of facts similar to those in Allen's case, O'Connor, M. R., thought that the doctrine of the Marais case should not apply to a death sentence. The decision in that case had been subject to much criticism, and Dicey had remarked that it should be accepted only in the light of the particular circumstances, but not as an exposition of the whole law. Moreover, the military authorities were still restrained by the Restoration of Order Act, and other statutes which Parliament had enacted on a full knowledge of conditions in Ireland. So the Master of the Rolls took jurisdiction of an act of the military *durante bello,* where the penalty contemplated exceeded that authorized by statute and would be irreparable, and issued a writ of habeas corpus. The military authorities at first refused to obey the writ. Later the prisoners were liberated—a solution acceptable to the Master of the Rolls, though he thought that the military "took the wrong course."

The decision of the King's Bench in Allen's case seems to have been misunderstood. In an editorial on "The New Orientation of Martial Law Theory" the Solicitors' Journal [26] declared that the decision meant that the proclamation of the executive, even if unwarranted, created an irrebuttable presumption of the legality of martial rule. Then arose the case of The King (Garde) v. Major General Strickland [27] where counsel moved for writs of certiorari and habeas corpus, and if necessary a writ of prohibition, in order to question the finding of a military court by which Garde had been tried for treason. Coun-

[25] [1921] 1 Irish Rep. 265.

[26] 65: 352.

[27] [1921] 2 Irish Rep. 317.

sel reverted to the ancient test of the courts being open. That all of the King's courts were functioning must be conclusive of a time of peace. This case was distinguishable from Allen's, since the affidavit of the general was here controverted, and affidavits of citizens of Cork were adduced to show that war was not raging any longer. Were their Lordships holding court by virtue of the permission of General Macready?

On the other hand the government argued that the general's affidavit was conclusive, and that such had been the holding in Allen's case. Molony, C. J., called this a "somewhat startling argument," and added:

> This contention is absolutely opposed to our judgment in *Allen's Case,* and is destitute of authority, and we desire to state, in the clearest possible language, that this Court has the power and the duty to decide whether a state of war exists which justifies the application of martial law.

The existence of civil courts, said the justice, was not conclusive of peace. But "no idea could be more erroneous" than that their Lordships sat by permission of military officers. The right of a judge to sit was derived from the Crown. (But doubtless this was not meant to deny that the presence of the troops facilitated the functioning of the courts.) War might rage even in the face of the peaceful conditions of which the affidavits submitted by the defence bore testimony.[28] War did exist, and

> once the state of war justifying martial law is established to our satisfaction, we cannot interfere to determine what is or what is not necessary.

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[28] The King (Ronayne and Mulcahy) v. General Strickland [1921] 2 Irish Rep. 333, was heard at the conclusion of the Garde case. Facts

With the negotiation of the Irish treaty the British troops, for the most part, marched out, and left it to the provisional government to reconcile the irreconcilables. Of this number was Erskine Childers, who was taken prisoner of war by the provisional army, and tried before a military committee of three officers. Before sentence was promulgated his counsel moved for a writ of habeas corpus in the Chancery Division—where the earlier case of Egan had gone so favorably to the accused.[29] Counsel relied on this case, and the fact that the Restoration of Order Act was still in effect, since the Irish treaty had not become law. But the application was fruitless. O'Connor, M. R., now accepted the law as laid down in Allen's case:

> However doubtful the law may have been in the past, it is now clearly established that once a state of war arises the civil Courts have no jurisdiction over the acts of the military authority during the continuance of hostilities.

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and arguments were substantially alike, but in this case the defense placed particular stress on the proposition that there was a prerogative right in the King to proclaim martial law, but that this right had been surrendered and released by the Restoration of Order in Ireland Act, and that martial law could not now be proclaimed at any time or under any circumstances in Ireland without the consent of Parliament.

The court replied:

"We are of opinion that the first argument has no foundation in law. It is quite unnecessary for us to entangle ourselves in an academic inquiry as to the use of the word 'prerogative'. It is used sometimes in one sense, sometimes in another. The King is head of a standing army with the consent of Parliament. He cannot, it is conceded, merely by proclamation declare war inside his own dominions. It is also conceded that without such proclamation a state of things may exist when the military forces of the Crown may be employed 'in executing martial law.' We hold that when a state of things does exist which justifies the 'execution of martial law' and such is proved to our satisfaction, our hands are tied."

29 The King (Childers) v. Adjutant General [1923] 1 Irish Rep. 5.

The authority of the provisional government to set up military courts to try civilians was challenged before the King's Bench in Ireland in the King (Johnstone) v. General O'Sullivan.[30] Mrs. Johnstone had been charged, but not yet tried, on the allegation that she had had munitions in her possession. She applied for a writ of habeas corpus on the ground that the provisional government was one of only limited powers, and had no power to create an army; that the military courts were illegal; and that the resolution of the Dail Eireann, and orders and proclamations of the Army Council pursuant thereto, were ultra vires. The King's Bench refused to grant the writ *durante bello,* and this decision was affirmed by the Court of Appeal.

As to the title of the provisional government to raise an army to protect itself, it had, to be sure, no "paper title." But the British troops were for the most part gone, and the Lord Lieutenant, though still responsible, took no hand in restoring order. It was a fair inference that he left it to the provisional government to raise and employ the National Army. On this point Pim, J., said:

> I do not think any lawyer will deny that there is an inherent right at common law in every Government that may be attacked to defend itself, or that under the common law the Government were entitled to form an army —a force for the protection of itself and of the people committed to its charge. Not only had the Government the right to protect itself—to repel attacks on that which the King had established—but it was its bounden duty to do this, in doing so to use any force which was necessary, and to call on all well-disposed persons to

30 [1923] 2 Irish Rep. 13.

assist it. It required no transfer of powers to enable the Government to do this.

In the King (O'Brien) v. Military Governor[31] the Master of the Rolls had before him the application for a writ of habeas corpus to release Mrs. O'Brien from military custody. It appeared that the applicant had been arrested by Free State troops at her home in Dublin on January 14, 1923, and at the time of the hearing (June 15, 1923) was still detained in an internment camp. The applicant's sister made affidavit of the arrest and detention; no charges had been preferred; applicant had theretofore refrained from applying for habeas corpus on the advice that, *durante bello,* such an application was not sustainable. Now she begged to refer to the Irish Times of May 29, 1923, wherein DeValera and the Chief of Staff had proclaimed a cessation of hostilities by the I. R. A.

In reply the affidavit of General O'Sullivan was submitted, asserting that in fact war still raged in parts of the Free State, and that the irregulars were merely seeking a "breathing space." Courts now functioned only through the aid of troops.

O'Connor, M. R., took notice of the abundance of armored cars and military patrols in the streets, and of the troops who with fixed bayonets guarded the approaches to the courts. DeValera's alleged "cease fire order" did not prove that hostilities had ceased. The motion was refused—this by the judge who in Egan's Case three years before had issued a writ of habeas corpus to General Macready.

In the Court of Appeal the decision of the Chancery Division was reversed. Mrs. O'Brien relied on Article 6

31 [1924] 1 Irish Rep. 32.

of the Free State constitution, to the effect that no person shall be deprived of liberty except in accordance with law. But the Attorney General relied on the following proviso,

> that nothing in this Article contained shall be invoked to prohibit, control, or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion.

The Court held that this was merely declaratory of existing law, and that the writ must be granted unless a condition of war or armed rebellion existed in Dublin.

> The Court is bound, when its jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion, but once it so decides, it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, as in the present case, or the execution of a capital sentence after trial by a so-called military Court, as in *Allen's Case* and *Childers' Case*, or the execution of a person without trial, as in Rory O'Connor's Case.

The Court referred to the remark of the Earl of Halsbury in Marais' case, that the question, war or peace, might sometimes be difficult to decide. After surveying the evidence the Court of Appeal was of opinion that war no longer existed, and ordered the release of Mrs. O'Brien.[32]

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32 The necessary consequence of this decision must have been to liberate all prisoners of war. To prevent this the legislature enacted the Public Safety (Emergency Powers) Act, No. 28 of 1923, which came into operation two days after Mrs. O'Brien's release was ordered. This Act was renewed by Act No. 1 of 1924. In The King (O'Connell) v. Military Governor [1924] 2 Irish Rep. 104, a prisoner tested the legality of the order of General Mulcahy by which he had been interned. The court held that the legislation was within the competence of the Irish legislature, and not in violation of Article 6 of the Free State consti-

To summarize: though the individual judges have not always agreed on all of the points raised, the following seem to be established as the law of the Empire: (1) that martial rule may lawfully obtain where war actually exists or is imminently threatened, though some or even all of the courts are sitting; (2) that the courts will decide for themselves whether a state of war and the necessity for martial rule are made out; (3) but that once a state of war is made out, the judiciary will not interfere with any act which the military authority sees fit to take.

It is a long way from Wolfe Tone to Erskine Childers.

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tution. The court followed the case of The King v. Halliday, [1917] A. C. 260. However, Pim, J., thought that a permanent law giving the executive a power to hold citizens without trial would conflict with the spirit of Article 6; but this was a temporary measure for abnormal times.

CHAPTER VIII

MEASURES OF MARTIAL RULE: TRIAL AND PUNISHMENT—IN THE UNITED STATES

> Outside the actual theater of war, and if, in a true sense, the administration of justice remains unobstructed, the right of the citizen to normal judicial procedure is secure.
>
> Charles Evans Hughes, War Powers Under the Constitution, 12.

§ 37. The Milligan Case. In marked contrast to the latitudinarian view of martial rule which the courts of the British Empire have of late developed is the opinion of the United States Supreme Court in the leading case on this subject:

> Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[1]

Milligan, resident in the loyal State of Indiana, had been tried before a military commission convened at Indianapolis during the latter part of the war. The charges were conspiracy against the government, aiding the rebels, and various other offenses. Milligan was found guilty and sentenced to be hanged. He petitioned for a habeas corpus, and on a certificate of disagreement

[1] Ex parte Milligan (1866) 4 Wall. 2, at 127. The Milligan Case has been published in the American Trials series, Samuel Klaus, ed.

in the circuit court the case came before the Supreme Court of the United States. The question was, had the military commission jurisdiction of the case? That it had not, and that its proceedings and sentence were void, was the unanimous opinion of the court. Congress had never attempted to convey such powers upon a military tribunal sitting in a peaceful State. From the dictum of the majority, to the effect that Congress could not have conveyed such power, four justices dissented.

The majority spoke through Justice Davis, friend and appointee of President Lincoln. Their opinion ran as follows. Jury trial and analogous rights for the protection of personal liberty were guaranteed by the Constitution. This Constitution was a law for rulers and people, equally in war and in peace. There could be no doctrine more pernicious than that "any of its provisions can be suspended during any of the great exigencies of government." Within the Constitution would be found powers adequate for all emergencies. Certainly the military commission was not a court within the meaning of the Constitution. Nor could its jurisdiction be derived from the laws and usages of war. For the court had judicial knowledge that the federal authority was unopposed in Indiana; its courts were always open; "and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power." One of the plainest constitutional provisions was infringed when Milligan was tried by a court not ordained by Congress, and not composed of judges appointed during good behavior.

Another guarantee was violated when Milligan was denied a jury trial. Members of the military service might lawfully be tried otherwise. "*All other persons,*

citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury."

But it had been urged that martial law covered with its broad mantle the proceedings of the military commission. There was no contention over the power to proclaim martial law "when war exists in a community and the courts and civil authorities are overthrown." But such had not been the situation in the State of Indiana.

> On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion must be real, such as effectually closes the courts and deposes the civil administration.

The courts of Indiana, with military protection if need be, were adequate. If the government wished to convict only the guilty, surely the regular judges were better than military gentlemen untrained in the law. The court conceded that martial rule had its proper place:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued *after* the courts are reinstated, it is a gross usurpation of power.[2]

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[2] Compare this with the language of Sir James Mackintosh, *supra*, p. 108.

Though the President had, with authority from Congress, suspended the privilege of the writ of habeas corpus, the suspension of the privilege did not suspend the writ itself.

> The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

The minority of four justices[3] (speaking through Chase, C. J.,) while agreeing with the decision of the majority, dissented from the language employed in the opinion.

> We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of *habeas corpus,* and of its suspension, with two reservations: (1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.
>
> We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

The Constitution provides for military government as well as civil government. What is the proper sphere of the former? The power of Congress to provide for the government of the land and naval forces and of the militia was not affected by the bill of rights. And was

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3 Chase, Swayne, and Miller had been appointed by Lincoln; Wayne was a Jacksonian.

it impossible to imagine cases in which citizens conspiring or attempting injury to the national forces might be subjected to military trial in the just exercise of this power?

But the dissenting justices did not rest their opinion on the power to provide for the government of the forces. Congress had power to raise and support armies, and to declare war. This included all powers essential to the prosecution of the war.

Neither the President nor a commander under him had power, without the sanction of Congress, to institute tribunals for the trial and punishment of offences, either of soldiers or civilians, "unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."

Where peace exists the laws of peace must prevail. But when the nation is involved in war, and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what districts such imminent public danger exists as justifies the authorization of military trial for crimes and offences against the discipline and security of the army or against the public safety. Cases might arise where the courts were open and yet wholly incompetent to avert threatened disaster. In Indiana the judges and court officers had been loyal. It might have been otherwise; they might have been in active sympathy with the rebels.

So much for the question of power: "it was for Congress to determine the question of expediency."

In contrasting these rival expositions of the law, the following differences are observed: the majority would confine punitive martial rule to territory where the courts had ceased to function; the minority considered

this not an absolute test. The majority would permit martial rule only when absolutely necessary; the minority would accept constructive necessity, to be determined by Congress, or in an emergency, by the President. The minority also held that the suspension of the writ was of itself an authorization for the President to make arrests; the majority held that he was still limited by the Fourth Amendment. Obviously the Marais decision would have given comfort to the minority of the court.

As to the power of Congress to establish martial rule Hare expresses the conclusion that "when necessity gives the right, legislation is superfluous; when it does not, the right cannot be conferred legislatively."[4] Doubtless this would be true if the necessity for martial rule were objectively demonstrable. But this is a matter on which men would differ, as they did with regard to the trial of Vallandigham and many other exertions of power during the Civil War. Though the opinion of Congress would doubtless not be conclusive, it would certainly be entitled to great weight in any court.[5] One

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[4] Amer. Const. Law, II, 964.

[5] It has been argued emphatically that the power of the government to protect itself by resorting to martial rule in time of war is an inherent sovereign power, and that the need of its exercise constitutes a political question. Fletcher, The Civilian and the War Power, 2 Minn. L. Rev. 110 ff.; Wallace, The Need, the Propriety and Basis of Martial Law, 8 Journ. of the Amer. Inst. of Crim. Law and Criminology, 167 ff., 406 ff. Certainly the Supreme Court has on various occasions spoken of inherent sovereign powers of the federal government. See Willoughby, *op. cit.*, 2d ed., I, 83, 91. Prof. Fletcher concedes that Kansas v. Colorado (1907) 206 U. S. 46, vigorously opposes this doctrine. Supposing the idea to be sound as a means of justifying the emission of legal tender, the exercise of the right of eminent domain, and the deportation of an alien, it can hardly be invoked to justify the suspension of the bill of rights.

Mr. Wallace argues for an inherent right of a State in the federal union to defend itself, even to the extent of exercising war powers. In reply it may be said that concepts of international public law are only partially applicable to States: for the federal Constitution express-

calls to mind the test of "a clear and present danger" of bringing to pass some substantive danger that Congress has a right to prevent, as laid down in one of the cases on freedom of speech in war time.[6] As originally formulated the test was to be judicially applied; but the Court has since shown its disposition to defer to a legislative declaration as to what constitutes such a danger.[7] In their attitude toward the necessity for martial rule judges may (and do) err, on one side or the other. So may the political branches of the government. How far the former should be bound by the judgment of the latter

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ly negatives the exercise of a number of inherent sovereign powers and, *inter alia,* withdraws from the States the exercise of war powers. New Hampshire v. Louisiana (1883) 108 U. S. 76. A state may defend itself, but only with the means which the Constitution leaves at its disposal. That these may prove inadequate is recognized by the Constitution, Art. IV, where the support of the federal government is guaranteed.

It is needless to argue for inherent national power when the war power is expressly conferred. The criterion for its exercise is not absolute necessity, but reasonable appropriateness. But in some directions the war power runs into the teeth of the bill of rights. Where shall the boundary be drawn? Prof. Fletcher points out that the bill of rights makes no express exception even of cases arising in the "actual theater of war"; yet the Milligan decision admits that there is no right to jury trial in such a place. So there is a point where the war power overrides the bill of rights; where this point lies involves considerations of technical military science, of which the political branches of the government should be the judge. "The folly of submitting such a question to a decision of a jury is too evident to need comment." 2 Minn. L. Rev. at 128. Mr. Wallace says, p. 419, "it is not for the branch of government that has demonstrated its inability to control the situation to handicap another branch that is charged with the duty of restoring law and order."

Certainly this is not the law of the American Constitution. It is the function of the judiciary to draw the boundary between constitutional powers and prohibitions. The author admits that the line laid down in the Milligan case may be somewhat too restrictive of the war power of the United States.

6 Schenck v. United States (1919) 249 U. S. 47.

7 Gitlow v. New York (1925) 268 U. S. 652.

is a question to be approached in the light of experience. Doubtless in America we would lean toward an effective judicial control.

§ 38. **Criteria of the Legality of Martial Rule.** There is general agreement that Justice Davis went too far when he said that martial law cannot arise from a threatened danger, that the courts and civil administration must already have been deposed.[8] This would seem to be the view of the present Chief Justice, in a cautious comment on the Milligan case:

> Certainly, the test should not be a mere physical one, nor should substance be sacrificed to form. The majority recognized "a necessity to furnish a substitute for the civil authority," when overthrown, in order "to preserve the safety of the army and society." If this necessity actually exists it can not be doubted that the power of the Nation is adequate to meet it, but the rights of the citizen may not be impaired by an arbitrary legislative declaration.[9]

There is no doubt that in the very presence of an enemy (whether invading or domestic) martial rule may be exercised. This was the case along the military frontier between North and South during the Civil War. To a greater or less degree it will be impossible in such a case for the civil administration to carry on. The courts cannot exercise an untrammeled jurisdiction. In this extremity the authority of the military commander is for the moment supreme, and martial rule will exist to its full extent. This will not be by virtue of any

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8 Willoughby, Const. Law, 2d ed., III, 1602; Hare, Amer. Const. Law, II, 964; Glenn, The Army and the Law, 188–90.

9 War Powers Under the Constitution, Sen. Doc. No. 105, 65th Cong. 1st Sess., 12.

proclamation, but as an inevitable fact. As the Supreme Court of Montana put it,

> When in domestic territory the laws of the land have become suspended, not by executive proclamation, but by the existence of war, the Executive may supply the deficiency by such form of martial law as the situation requires.[10]

The common law has always admitted that "martial law"—meaning the right of the general to dispose of life, liberty, and property with such informality as the exigency imperatively demands—might properly be exercised in an area where war actually rages. The test consecrated by the sages was this: did the presence of hostilities render the courts unable to exercise their jurisdiction? But the Boer War saw a civil court under military protection trying cases at the very moment when the city where it sat was besieged by the Boers.[11] And in the Irish rebellion a barbed wire entanglement separated the courts from the scene of actual warfare. To be sure, in such cases the courts enforce their processes thanks to military support; but the same might temporarily be true in case of some domestic disorder which fell far short of war and would not justify punitive martial rule.[12]

Then there is the case of localities removed from the line of battle which are, however, of the greatest military importance—the vicinity of a concentration camp, a navy yard, or a base of supplies. At the outbreak of the Civil War Baltimore was a most essential point on the line along which troops must be brought to the relief

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10 Ex parte McDonald (1914) 49 Mont. 454.

11 The Queen v. Bekker (1900) 17 Sup. Ct. Rep. 340.

12 As, for example, at the time of the Pullman strike in Chicago. In re Debs (1895) 158 U. S. 564.

of Washington. The courts were sitting; but it is not doubted that the President was justified in applying such a degree of control as was necessary to insure the effective prosecution of measures of national defense. In a case arising during the World War Judge Manton observed that having regard to the nature of naval operations New York harbor was within the field of active operations, and that the "theater of war" as used in the Milligan case must expand with the progress in means of destruction.[13]

Punitive martial rule is justifiable only as a war measure. But it is believed that the criterion of the courts being open or closed is imperfect. It is a fiction which served well in the time of the Stuart kings, but may easily be too restrictive in time of modern war. The necessity for martial rule arises rather from the proximity of a danger than from the fact that the courts are closed.[14] No doubt Professor Dicey was right when he said that this is not an absolute test, but that where the courts fully and freely exercise their ordinary jurisdiction, there should be a presumption that punitive martial rule cannot obtain.[15] On proof of some critical exigency this presumption would be rebutted.

In explaining what he considered the proper point of view from which to construe law in time of war, Circuit Judge Hough observed:

> The present being in the quaint language of *The Eliza*[16] a "solemn" or "perfect" war, all the people of one nation being arrayed against all those of another; congress has created a body of legislation to be justified

13 United States ex rel. Wessels v. McDonald (1920) 265 Fed. 754.
14 Richards, Martial Law, 18 L. Q. R. 133.
15 Law of the Const., 7th ed., 544.
16 (1800) 4 Dallas 37, at 40.

> and upheld only by the simple and fundamental doctrine that the power to perform an act includes by necessary inference the power to do it in any way or by any means not specifically prohibited, which classic *dictum* in its modern application assumes that waging a twentieth-century war means waging it with a people disciplined, that is, guided and assisted in production, distribution, sale and consumption, as well as with an army and navy subsisting on the fruits of such discipline behind the lines.[17]

In reconciling the war power with other provisions of the fundamental law it is not believed that judges will forget that it is, after all, a *constitution* which they are expounding. Certainly in the last conflict the executive arm of the government did not suffer from judicial jealousy. If the need should ever arise it cannot be doubted that the Milligan case will receive such modification as the circumstances may require.

Only a distorted view of martial rule can result from rancorous reflections about military dictatorships. There is every reason to believe that military commanders will continue to act under the direction of the President. And the President in time of war would probably enjoy the support of a majority of the people—some moved by rational considerations, others giving their consent for less valid reasons. At such a time the army is not likely to get out of step with dominant public opinion. The problem therefore is not one of applying brakes to military power, but of drawing the line between the individual and the crowd.

§ 39. The Trial of Civilians by Court-Martial. It is to be noted that the code of military law subjects to trial by court martial not only officers and men in the military

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[17] Law in War Time—1917, 31 Harv. L. Rev. 692 at 700.

service, but also "all retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."[18] During the recent war the expression "in the field" received a judicial construction which gave the military authority ample power over civilian employees upon whose loyal and honest service the army depended.[19]

There are two articles of war which go much farther and conflict with the Constitution as interpreted in the Milligan case. According to the 81st article of war,

> Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

In general the articles of war are specific, referring to "any soldier," "any officer," or "any person subject to

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18 2d article of war. Act of June 4, 1920, 41 Stat. 787.

19 Held applicable to a civilian on an army transport who refused to serve as lookout, Ex parte Gerlach (1917) 247 Fed. 616; to a cook who deserted an army transport at Brooklyn, Ex parte Falls (1918) 251 Fed. 415; to a superintendent, Quartermaster Corps, serving with troops on the Mexican border, Ex parte Jochen (1919) 257 Fed. 200; and to a field auditor employed by a constructing quartermaster at Camp Jackson, S. C., Hines v. Mikell (1919) 259 Fed. 28, overruling Ex parte Mikell (1918) 253 Fed. 817; certiorari was denied by the Supreme Court, (1919) 250 U. S. 645. Held not to apply to a chauffeur employed by a contractor doing construction work at Camp Devens, Mass., Ex parte Weitz (1919) 256 Fed. 58.

military law," in sharp contrast to the all-embracing "whosoever" in the provision quoted above. If it were attempted to apply this to civilians without regard to time and place, there is little doubt but that it would be held unconstitutional.[20] But it is urged by Professor Morgan that the article could be applied to civilians not merely within the theater of war, but also in any place over which the military forces had actual control and jurisdiction, since these might properly be deemed "cases arising in the land or naval forces."[21]

Similar objections apply to the 82d article of war, which provides that

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

It seems pretty clear that, with regard to persons not otherwise subject to military law, the word "elsewhere" must be interpreted as meaning in the theater of war or in any other place under the actual control and dominion of the military forces.[22] It is to be noted that this reasonable construction, rather than the absolute meaning

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20 Morgan, Court-Martial Jurisdiction Over Non-Military Persons, 4 Minn. L. Rev. 79, 106; Underhill, Jurisdiction of Military Tribunals in the United States Over Civilians, 12 Calif. L. Rev. 75 and 159, at 85; Willoughby, *op. cit.*, III, 1548; Burdick, *op. cit.*, 265.

21 *Op. cit.*, 107. The Fifth Amendment excepts from the requirement of presentment or indictment by a grand jury "cases arising in the land or naval forces." It may be assumed that the same exception is to be read into the Sixth Amendment guaranteeing the right to trial by jury. Underhill, *op. cit.*, at 76.

22 Morgan, *op. cit.*, 115, Underhill, *op. cit.*, 85 ff.; Burdick, *op. cit.*, 266; Willoughby, *op. cit.*, III, 1548.

of the words of Congress, is adopted by the Judge Advocate General's Department.[23]

During the recent war a German agent named Waberski was arrested just as he crossed the border from Mexico, with the declared intention of spying. He was tried by court-martial for a violation of the 82d article of war, found guilty, and sentenced to death. Waberski was a German subject acting under the direction of the German Minister in Mexico City; but he contended that he was a Russian national.[24] On the assumption that the man was of Russian nationality, Attorney General Gregory advised the President that under the circumstances he could not constitutionally be subjected to trial by court-martial.[25] The Attorney General accepted Ex parte Milligan as having settled the law. Before the matter was closed Waberski died a natural death. If the man was an enemy alien there was no constitutional reason why he might not have been tried by court-martial. For alien enemies have no rights or privileges under municipal law, unless by special favor.[26] In the similar case of a German naval officer arrested in New York and turned over to the naval authorities for trial on a charge of spying, it was held that there was no right to a trial in a civil court.[27]

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23 The Manual for Courts-Martial, 1921, provides (art. 431) that the traffic with the enemy punished by the 81st article of war must have been "in the theater of operations." To bring an accused within the 82d article of war he must have been found "within our zone of operations." Manual for Courts-Martial, 1928, art. 142, and p. 222.

24 Professor Morgan gives an account of the case, *op. cit.*, 79.

25 31 Op. Atty. Gen. 356 (1918).

26 De Lancey v. United States (1918) 249 Fed. 625, and cases there cited.

27 United States ex rel. Wessels v. McDonald (1920) 265 Fed. 754; appeal dismissed per stipulation, 256 U. S. 705.

In April, 1918, there was introduced in both Houses of Congress a bill to subject to trial by court-martial persons who should endanger the good discipline, order, movements, health, safety, or successful operations of the land and naval forces by acting as spies in time of war in the United States.[28] Senator Chamberlain sponsored the bill, and in the Senate Committee on Military Affairs, of which he was chairman, there was some disposition to favor the proposal as reconcilable with the Milligan decision. The President let it be known that he opposed such a measure, the Attorney General declared that its policy was "exactly contrary" to the view of his department, and opposition developed on the floor of Congress. Senator Chamberlain recognized that he could not push the bill over a Presidential veto, and let it die in committee.[29] It is believed that the proposal was quite unnecessary under the circumstances of 1918, and it is interesting to note that the executive branch of the government so regarded it.

§ 40. The West Virginia Cases, 1912–1921. It is a far cry from the spirit of the Milligan opinion to the views entertained by the Supreme Court of West Virginia in 1912–1914, when an exercise of martial rule was challenged before that tribunal.[30] Here the State court started from a premise that the governor had authority under State law to declare the existence of war. In a preceding chapter this proposition was questioned on the ground that, agreeably to Article I, section 10, clause 2 of the United States Constitution, no State was competent to wage war under circumstances such as ob-

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28 S. 4364, H. R. 11556.

29 56 Cong. Rec., pt. 6, 5401, 5471–2; pt. 12, App. 307–8.

30 State v. Brown (1912) 71 W. Va. 519; Ex parte Jones (1913) 71 W. Va. 567; Hatfield v. Graham (1914) 73 W. Va. 759.

tained in West Virginia. But aside from this federal question, the fundamental law of the State seemed to speak in no uncertain language in this regard.

Among the provisions of the Constitution of West Virginia were the following:

> The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism.[31]
>
> The privilege of the writ of habeas corpus shall not be suspended.[32]
>
> The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State.[33]

The governor was made commander-in-chief of the militia, and authorized to call forth the militia to execute the laws, suppress insurrection, and repel invasion.

In contrast with these fundamental provisions is the act of the State legislature purporting to authorize the governor, in his discretion, "in the event of invasion, insurrection, rebellion or riot," to declare a state of war.[34]

It would have seemed safe to assert that in their Constitution the people of West Virginia had locked every door against punitive martial rule. Not so said the highest court of the State, Robinson, J., vehemently dissent-

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31 Constitution, Art. I, § 3.

32 *Ibid.*, Art. III, § 4.

33 *Ibid.*, Art. III, § 12.

34 W. Va. Code, c. 18 (Military Code) § 92, (Acts of 1897, c. 61, § 92), quoted *supra*, p. 83.

ing. The justices were able to reconcile the act cited above with the provisions of the State Constitution. So the governor could declare war. Since this was committed to his discretion, his decision was not reviewable. So it was established that war did exist in West Virginia. This brought in its wake trial by military commission, for, said the court,

> We think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government.

As to the test of the courts being open, the court said:

> That the courts of Kanawha county sit within the limits of that county and outside of the military zone does not preclude the exercise of the powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of the military occupation and immediately before, was such as to preclude the free exercise and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha county. The Constitution and laws themselves admit the obvious inadequacy and insufficiency of ordinary process and penalties, in cases of insurrection, by authorizing military suppression thereof. . . . The civil tribunals, officers, and processes are designed for vindication of rights and redress of wrongs in times of peace. They are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection. So the Legislature evidently regards them, since it expressly authorizes the Governor,

"in his discretion," to "declare a state of war in towns, cities, districts, and counties."

It has already been urged that this whole opinion makes a fundamental error in calling the insurrection a war.[35] Dislodge that stone, and the whole structure tumbles. But there are other weaknesses. When the court says that the process of local tribunals could not run during (*i. e.*, apparently, *because of*) the military occupation, does it not reason in a circle? If the test of the courts being open means anything, it means that absolute martial rule is a consequence of the courts being closed; the court turned the doctrine around, and said that the courts were not functioning because of the military occupation. The ousting of the courts calls for martial rule, not martial rule for the ousting of the courts.

Again, it was said by the court that when the State constitution provided for the suppression of insurrection by force of arms, it recognized the insufficiency of ordinary process and penalties. It is submitted that this is a non sequitur. Insurrection is not the only emergency wherein a government may employ troops to execute its will. In re Debs[36] is authority for saying that the national government may keep open the channels of interstate commerce by force of arms if need be. Would it follow that Debs might have been tried by a military commission? No one would contend so. According to

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35 *Supra*, pp. 98 ff; Fletcher, The Civilian and the War Power, 2 Minn. L. Rev. 110, 131 note.

36 (1895) 158 U. S. 564. "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . If emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

the West Virginia court, the right to try by military commission is a necessary consequence of the right to employ troops.

Finally, it may be remarked that the court accepted the judgment of the legislature as to the necessity of military trial by giving full effect to the statute of 1897 which was interpreted to confer war powers upon the governor.[37] In two later cases[38] the Supreme Court of West Virginia reaffirmed the views already put forward in State v. Brown.

These West Virginia cases go a long way. But considering the path on which the court had set its feet in State v. Brown, it is difficult to see where it could stop. Short of impeachment, there is, according to this view, apparently no limitation on the governor but his conscience. War exists when he so declares; thereafter he may do what he will until bad faith is proved, or until he is removed by impeachment and conviction.

Eventually the court had to call a halt. As related in a previous chapter, the governor had declared war in Mingo County, and ordered the acting adjutant general to suppress it with the aid of civil authorities and the posse comitatus. Lavinder and others were arrested for violating martial law regulations (having a pistol, or passing through a tent colony of striking miners), and were confined to the county jail. They petitioned for writs of habeas corpus.[39]

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37 The statute in question was an act "concerning the military force of the State," and applicable throughout to the militia. An examination of the statute raises the query if, in the passage quoted, the legislature meant anything more than to enable the governor to subject the militia to the penalties envisaged in the articles of war by declaring that, so far as they were concerned, the conditions of war should prevail in a designated district.

38 Ex parte Jones and Hatfield v. Graham, *supra*, p. 76.

39 Ex parte Lavinder (1921) 88 W. Va. 713. Miller, J., dissenting.

In view of its former decisions, the Supreme Court could scarcely deny that when the governor declared war it was war. And yet the justices could not help but know that it took more than one officer to wage a war. So they drew a line between "actual" and "merely theoretical" warfare. Until military forces were mobilized and employed, there could be no actual warfare nor martial law. And until martial law obtained, there could be no martial law regulations.

> The proclamation of war did not, ipso facto, nor ex proprio vigore, inaugurate martial law in Mingo county.

Unless strictly construed, the war powers of the governor might lead to a despotism. The returns to the writ were found insufficient, and the prisoners were discharged.

§ 41. The View of the Supreme Court of Montana, 1914. In September, 1914, the militia of Montana was occupying Silver Bow County, then in insurrection. On September 24, Dan Gillis petitioned for a writ of habeas corpus, alleging unlawful detention by the military authorities.[40] Major Roote, being appointed a summary court, had tried Gillis on a charge of assaulting and resisting an officer. Petitioner had been found guilty and sentenced to the payment of a fine of $500.

The military authorities endeavored to justify their action under the governor's proclamation of martial law, and submitted "that the Supreme Court of Montana was without jurisdiction in the premises . . . "

This petition was heard with that of McDonald and others, discussed elsewhere. The court remarked that "it will be readily noted that the position taken by the

40 In re Gillis (1914) 49 Mont. 454.

respondents in the Gillis case is much broader than that presented by the returns in the causes first presented." Apparently the executive branch was endeavoring to steal a page from West Virginia jurisprudence.

The court stated the question involved in Gillis' case:

> Is it possible for the executive by proclamation or otherwise to constitutionally establish in this state any form of martial law which will authorize the conviction of a civilian for crime, without trial by jury?

The court was emphatically of opinion that it was not possible.

The insurrection in Silver Bow County was not a war, such as confronted the Supreme Court of the United States in the Prize Cases. So any talk of war powers was beside the point. As to the courts being open in the proclaimed zone:

> So far as the right to trial by jury in case of insurrection is concerned, it does not seem to us vitally important whether the courts are . . . open when the military appear. It may be granted that courts which are prevented by insurrection from executing their process are not open in contemplation of the law. To open them is a part of the duty devolving upon the military. It was conceded at bar that some of the courts of Siver Bow county are in operation, though it was insisted to be only such as are permitted by the military authorities; the others being closed by their order. No such cloture can be recognized.

The court disposed of the petition as follows:

> The trial and commitment of petitioner Gillis were void, and his detention thereunder cannot be upheld. But he is not entitled to his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the state. He must,

therefore, be remanded to the custody of respondents, to be dealt with according to law.

§ 42. Two Recent Cases of Punishment During Martial Rule. In striking contrast to the Gillis decision are two more recent cases in federal district courts. In United States ex rel. McMaster v. Wolters [41] a civilian had been tried by a provost judge on a charge of exceeding the speed limit fixed by city ordinance, and committed to jail in default of payment of the fine imposed. This was during a period of "martial law" at Galveston, wherein the military commander had displaced the city commission and the local judges. The case came before the federal district court on the ground that the petitioner was being detained in violation of rights guaranteed by the United States Constitution. The court upheld all that had been done: The governor had been within his rights in declaring "martial law," and in doing whatever was necessary to make his proclamation effective. So the suspension of the city court was legal. Said the court:

> That is not without precedent in history. When Gen. Butler was in command of New Orleans, he did this very thing. He appointed the provost marshal and gave him jurisdiction to try civil cases. Subsequently President Lincoln created a provisional court by proclamation for the same district. The jurisdiction of this court was upheld. The Grapeshot v. Wallerstein, 9 Wall. 129. . . .
>
> It seems to me it was necessary and proper that this court should have been instituted. . . . Manifestly, in a community under martial law, a trial by jury would be impracticable.

41 (1920) 268 Fed. 69.

Many exceptions may be taken to this view. Most fundamental is the inapplicability of a war-time case arising in a belligerent community to a city where the longshoremen had gone on strike.

Local color is added by the fact that Judge Foster was sitting on the very bench from which, a hundred years before, Judge D. A. Hall was whisked into Andrew Jackson's guard house.[42]

Two years later came United States ex rel. Seymour v. Fischer,[43] where the governor of Nebraska had declared "martial law" and where two citizens had been tried by military commission and sentenced to jail, one for retaining arms in his possession, the other for keeping open a prohibited place of business. The cases were heard after the governor had declared that order was restored. So the federal court had to answer the novel question whether the sentence of a military tribunal would continue to run. The petitioners alleged that their continued imprisonment was lacking in due process of law: (1) martial law did not exist at the time of the alleged offenses; (2) the military commission had no power to try them; and (3) the sentence of the commission could not outlast the period of military occupation. The opinion of the court was similar to that in the Galveston case:

> When a state of war or insurrection exists, and the governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war.

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[42] Judge Foster knew the incident well, as appears from his article on The Suspension of the Writ of Habeas Corpus, 3 Va. L. Reg. N. S. 665, 671.

[43] (1922) 280 Fed. 208.

Limited to a condition of war, this doctrine would receive universal assent. But to say that in time of mere insurrection the will of the commander is controlling, and that he is subject only to the laws and usages of war, is believed to be quite erroneous.

The court concluded that trial by military commission had been lawful during the period of "martial law" in Nebraska City. This was bolstered upon Civil War cases and the West Virginia and Galveston precedents. Since the sentences were lawful, "the establishment of peace" could not cause them to expire. "While the necessity for crushing of further resistance may have passed, the reason for continuance of sentences theretofore given has not ceased."

So our case law presents the anomalous result that punitive martial rule, which was not allowable in the case of Copperheads in Indiana during the Civil War, is in fact upheld in cases of labor disorder. The result is an ill-fitting garment—a bit too tight in some places, much too ample in others. It is believed that some alteration is badly needed. Whatever may be the interpretation of State constitutions by State courts, the Fourteenth Amendment and other provisions of the United States Constitution are yet to be heard from. The two federal decisions just criticised were rendered in courts of first instance, and have certainly not settled authoritatively the federal questions raised.

CHAPTER IX

MEASURES OF MARTIAL RULE: INTERFERENCE WITH LIBERTY AND PROPERTY

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.
>
> Justice Holmes in Moyer v. Peabody (1909) 212 U. S. 78.

§ 43. The Writ of Habeas Corpus in Time of War. The federal Constitution provides that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.[1] While the phrasing thus finally decided upon in the constitutional convention did not specifically state, it had been assumed down to the Civil War that it was for Congress in its discretion to decide when the public safety did require such a course.[2]

During the War of 1812 the State judiciary did not hesitate on habeas corpus proceedings to order the liberation of persons held in military custody or control.

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1 Art. I, § 9.

2 Ex parte Bollman (1807) 4 Cranch 75, 101; Johnson v. Duncan (1815) 3 Martin (La.) 531, 532, 549; Story, Commentaries, III, § 1336. At the time of the Burr conspiracy in 1807 the Senate voted to suspend for three months the privilege of the writ of habeas corpus; but in the House the bill was rejected, 113 to 19. The House debated the measure at some length, without any suggestion that the suspension was other than an attribute of Congress. Annals of Cong., 9th Cong. 2d Sess., 44, 402–25.

In the Matter of Stacy [3] the Supreme Court of New York had before it the case of a petitioner whom Commodore Chauncey (commanding on Lake Erie) had charged with treason against the United States committed within British territory. The prisoner had been turned over to the custody of the provost guard at Sackett's Harbor. The provost marshal's return to the writ stated these facts, but did not expressly claim exemption from the operation of the writ. The court, speaking through Kent, C. J., ordered that an attachment should issue against General Morgan Lewis, commanding at Sackett's Harbor, but that it should not be served if that officer should liberate Stacy or bring him before the court's commissioner. The Supreme Judicial Court of Massachusetts did not even question its power to grant writs of habeas corpus for the discharge of minors enlisted in the United States army in time of war.[4] That a State court should at any time grant a habeas corpus in the case of one held under claim or color of federal authority has since been negatived in Tarble's Case.[5] Yet it is profoundly significant of our legal traditions that so great a judge as Kent should not have hesitated to grant an attachment against the commander of a frontier post in time of war.

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3 (1813) 10 Johns. 328.

4 Com. v. Harrison (1814) 11 Mass. 63; Com. v. Cushing (1814) *ibid.* 67; Com. v. Chandler (1814) *ibid.* 83. It may show something of the attitude of the court to recall that at the outbreak of the war of 1812 it had advised the governor that he might use his own discretion in acting upon the President's requisition of the State militia. Opinion of the Justices (1812) 8 Mass. 550.

In the Matter of Ferguson, (1813) 9 Johns. 239, the Supreme Court of New York was asked to allow a writ of habeas corpus in the case of a soldier in the army. Held: that as a matter of discretion the writ should be refused, as a federal judge could afford the requisite relief. Whether a State court had jurisdiction in such a case—*dubitatur.*

5 (1871) 13 Wall. 397.

The power of courts to control military detentions in time of war became an acute question in 1861. On the charge of having participated in the attack on the Sixth Massachusetts Militia and in the destruction of railroad bridges to prevent the passage of troops to Washington, one Merryman was arrested and confined at Fort McHenry, Baltimore. Chief Justice Taney at chambers granted a writ of habeas corpus directed to the post commander.[6] That officer declined to produce his prisoner, informing the chief justice that he was duly authorized by the President to suspend the writ in such cases. Taney held that the petitioner was entitled to his discharge. The President could not suspend the privilege of the writ of habeas corpus nor authorize a military officer to do it; this was exclusively committed to Congress. A military officer had no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the United States, except in aid of the judicial authority, and subject to its control. If a military officer arrested a citizen, it was his duty to surrender the prisoner immediately to be dealt with according to law.

The general refused to comply with the decision. Thereupon the chief justice decided that he had exercised all the power which the Constitution and law conferred upon him, and that the judiciary had been resisted by a force too powerful to be overcome. He therefore directed that a copy of his decision in the case be transmitted to the President, and added that it would then rest with that high officer to determine what measures should be taken to cause the civil process of the United States to be respected and enforced.

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[6] Ex parte Merryman (1861) Fed. Case No. 9487. Additional facts are given in Joel Parker, Habeas Corpus and Martial Law, 93 No. Amer. Rev. 471.

This view was followed in Ex parte Benedict,[7] where the authorities are reviewed at length. In Ex parte Field [8] it was held that only Congress could suspend the privilege of the writ of habeas corpus within the meaning of Article I, § 9; but the President's proclamation of martial law on September 24, 1862, brought about an "entirely different state of facts" and was conclusive upon a court even in so loyal and peaceful a State as Vermont.

The President, on the advice of Attorney General Bates,[9] took the position that the chief executive was competent to judge of the necessity for suspending the writ of habeas corpus, and in this course was defended by such able lawyers as Horace Binney, Reverdy Johnson, and Joel Parker.[10] The President did not rely solely upon constitutional grounds: if he had exceeded his powers (which he did not admit) he none the less relied upon public support for his conduct, and was not disappointed in his trust that Congress would regularize any action which had not been warranted in law.

In his contention that the suspension of the privilege of habeas corpus as contemplated in Article I, § 9 of the Constitution is a legislative attribute, Chief Justice Taney was doubtless correct. But that fact is not necessarily conclusive of the question. For there is clearly a distinction between suspension as envisaged in that clause and the *ipso facto* suspension which occurs in places where war renders it incompatible with para-

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7 (1862) Fed. Case No. 1292.

8 (1862) Fed. Case No. 4761.

9 10 Opin. Atty. Gen. 74 (1861).

10 There is no need to give a résumé of the literature on this subject elicited by the Civil War. See S. G. Fisher, The Suspension of Habeas Corpus During the War of the Rebellion, in 3 Pol. Sci. Quart. 454 ff., and the list of pamphlets appended.

mount military duty for a military officer to obey the writ.[11] The right to habeas corpus must be somewhat affected by the existence of a state of war. It would scarcely be a sound exercise of judicial discretion to summon a commander from his post of duty in the field, and an officer might well be justified in refusing to appear if such a writ were directed to him. Perhaps the general in command at Baltimore, on the most important line of communication to Washington, in May, 1861, might fall within this rule. Certainly in time of war a commander may seize those who engage in operations against his forces,[12] and it may be wondered whether Merryman had not by his conduct subjected himself to military control.

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11 This is discussed fully by Judge Joel Parker in his article on Habeas Corpus and Martial Law, *supra*, and by the Supreme Court of Wisconsin, (especially by Dixon, C. J.) in Re Kemp (1863) 16 Wis. 359. This case was one of a military detention by a general in Wisconsin in 1863. The court felt obliged to hold that the President's proclamation of September 24, 1862, suspending the privilege of the writ of habeas corpus, was void. But an attachment was not issued, as it could not be enforced. The court, however, approached the question from no narrow point of view. It recognized that kind of suspension of the writ which comes with war and exists without proclamation, which is limited by the necessities of war and applies only (1) to cases where the demands upon the officer's time and services are such that he cannot consistently with his military duties obey the mandate of the civil authorities, and (2) to cases arising within districts properly subjected to martial law. Such suspension took place without the action of Congress, in case of military exigencies; but the officer should if possible make return of the facts showing his excuse for not obeying the writ.

12 In 11 Opin. Atty. Gen. 297 at 302 (1865), Attorney General Speed remarked; "An army . . . has a right, and it is its first duty, to provide for its own existence . . . by the means and in the mode usual among civilized nations when at war. Then the question arises, do the laws of war authorize a different mode of proceeding and the use of different means against secret, active enemies from those used against open, active enemies?" The attorney general thought not, and carried the principle to the point of sustaining the trial by military commission of persons charged with the assassination of President Lincoln.

No one has put the case more clearly than Chief Justice Taney himself, in language more appropriate to the situation in Baltimore in April, 1861, than it was to that in Rhode Island in 1842:

> It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it.[13]

Viewed from this angle, it can scarcely be cause for surprise that the executive branch did not dare to leave the punishment of cases such as Merryman's to juries drawn from the vicinage. As Professor Corwin concludes,

> Whether the President or the Chief Justice was in the right seems to depend on whether the district for which the writ was suspended was properly to be regarded as within the field of military operations at this time, for if it was the President's power as commander-in-chief had full sway.[14]

§ 44. Preventive Detention as a Means of Suppressing Insurrection. One of the measures to which the executive resorts most readily as a means of suppressing insurrection is preventive detention. It may be that the author-

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13 Luther v. Borden (1848) 7 How. 1, 13.

14 The Const. and What It Means Today, 3d ed., 37.

ities have had to act on suspicion, and that legal proof is for the moment out of the question. It may also be that the authorities, rightly or wrongly, have lost all confidence in local juries—to which of course it will be replied that a change of venue is available. When such detention comes before the courts on habeas corpus proceedings, the government will seek to justify its action as a necessary and proper means of restoring order. Or the executive may take the bolder course and declare that the privilege of the writ of habeas corpus is suspended in the case of insurgents. Or it may be contended that "martial law" has been proclaimed and that the writ of liberty is *ipso facto* suspended.

Druecker v. Salomon [15] was an action for false imprisonment brought against the governor of Wisconsin. The defendant admitted the arrest, but averred that he was authorized to enforce the federal draft laws during the Civil War, and that he had made the arrest as a measure for the suppression of a riot against the laws of the State and an insurrection against the laws of the United States. In giving judgment for the defendant the court held that he had been charged with discretionary authority to use troops to enforce the draft. This included a right to detain the prisoner so long as was necessary in his judgment to prevent further obstruction of the draft.

Where a stricter view is taken of executive power, a court may endeavor by writ of habeas corpus to undo the measures of suppression on which the governor is engaged. A case of this sort arose in North Carolina during a period of Ku Klux terrorism in reconstruction days.[16] The governor had by lawful authority declared

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15 (1867) 21 Wis. 621.

16 Ex parte Moore (1870) 64 N. C. 802.

Alamance county to be in a state of insurrection. As a measure of suppression the military commander was holding in custody the sheriff of the county and others. The chief justice issued a writ of habeas corpus which was served on the commander in the presence of his troops. He refused to obey under orders from the governor. The latter informed the court of his reasons: the presence of a secret insurrection, wherein assassination and outrage went unpunished, and civil magistrates were intimidated. The public interest required that the prisoners be not surrendered for the time being.

After hearing argument the chief justice held the governor's return insufficient. Full faith must be given to the declaration of insurrection. But the detention of the petitioner was not a proper measure, being in derogation of the State bill of rights, which provided that "the privilege of the writ of habeas corpus shall not be suspended." This express provision could not be abrogated by implication. So far as the military commander was concerned, the orders of the governor were an excuse for his refusal to obey the writ.

The court was without further power: the county was in insurrection, and a posse of insurgents could not be summoned to enforce the process of the court. So the chief justice followed the example set in Merryman's case and directed that a copy of his opinion be served on the governor. A month after the latter notified the chief justice that it was compatible with the safety of the State to obey the writ. The judge proceeded with the case and held the prisoners for civil trial.

Recent cases of preventive detention have run a different course. In 1899 when Shoshone county, Idaho, was in insurrection the individuals implicated in outrages were arrested and detained by the troops. In the State

Supreme Court a writ of habeas corpus was denied.[17] The court said:

> The only question presented for our determination is, does the petition state facts entitling the petitioner to the writ.

The court took notice of the proclamation, and continued:

> Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative or executive power of the government; but, from our view of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case [demand] . . . , it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued. The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does and has existed in Shoshone county for the past six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the military of the state, or of the federal government, to suppress such insurrection, and re-establish permanently the ascendancy of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived and set at naught by the judiciary. . . . If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel. . . . It is our conclusion that

[17] In re Boyle (1899) 6 Idaho 609.

> the petition does not state facts which show that the writ demanded ought to issue; wherefore the said demurrer is sustained and the writ denied.

The precedent thus set was followed by the Supreme Court of Colorado six years later, in the matter of Moyer.[18] This was an application for a writ of habeas corpus wherein the facts were similar to those in the Idaho case just cited. The court, Steele, J., dissenting, said in part:

> The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court or denied the right of trial by jury; neither is he punished for violation of the law nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military but must be . . . turned over to the usual civil authorities of the county to be dealt with in the ordinary course of justice. . . .
>
> Writ Discharged and Petitioner Remanded.

Justice Steele filed a dissent, the burden of which was that only the legislature could suspend the writ of habeas corpus, and that the executive could not detain a person longer than the time fixed for the return. He also spoke his opinion of deportations by the governor. The chief justice was impelled to reply in an additional opinion,

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18 (1905) 35 Colo. 154 and 159.

wherein he pointed out that the legality of deportations was not before the court, and that the majority had expressed no opinion as to the suspension of the writ of habeas corpus. The court had

> determined that petitioner was not entitled to his discharge, not because the privilege of the writ of *habeas corpus* was suspended, or the governor declared martial law, but for the reason that the governor, through his subordinate officers, was exercising a power conferred upon him by the fundamental law of the state.

The Montana case Ex parte McDonald [19] ran along the same line. The suspension of the writ of habeas corpus, said the court, was in the province of the legislature. But the decision in this case must rest on different grounds. The theory which accorded the least power to the governor was that which treated the militia as a major police force acting under the governor in his capacity as civil magistrate. And the court asserted that

> under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld.

Resort to the federal courts for protection against such an exercise of the State's power has yielded barren results. After Moyer was liberated he sued the governor and militia officers for damages, alleging a deprivation of rights guaranteed by the Constitution of the United States. The circuit court sustained a demurrer to the complaint [20] and on writ of error the case came before the Supreme Court.[21] The opinion written by Justice Holmes, holding that Moyer's imprisonment had invaded

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19 (1914) 49 Mont. 454.

20 Moyer v. Peabody (1906) 148 Fed. 870.

21 (1909) 212 U. S. 78.

no right under the federal Constitution, constitutes the most significant case on preventive measures in time of domestic violence. After remarking that the laws of Colorado directed the governor to employ the national guard to suppress insurrection, Justice Holmes continued:

> That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.
>
> So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. . . .
>
> No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. This is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

Though the language is broad, it seems clear that the opinion is meant to be read in the light of the facts in

that particular case. And so it should be.[22] Here the governor's judgment, but not his good faith, had been impeached; irreparable injury had not been done; punishment as such had not been meted out; the measures taken seemed appropriate to the end in view. On a radically different set of facts, as where the measures taken appeared needlessly arbitrary or patently inappropriate, the Court might distinguish. In practice the consequences of this decision have been profound and not always fortunate. Careless reading has made it seem a sort of *carte blanche* for executive action. Since 1912 the tendency has been to go beyond mere detention and to administer punishment by military commission. To this practice the Fourteenth Amendment has thus far offered no impediment.[23]

A recent and significant case on military detention arose out of the strike in Colorado in 1927–28. Governor Adams had issued an order declaring two counties to be in insurrection and directing the adjutant general to use such means as he saw fit to suppress it. One Palmer and others were arrested and held without charges being brought against them. Application for habeas corpus was made in the federal district court.[24] To the return of the respondents the petitioners demurred, and the demurrer was sustained. The question was, had the treatment of the petitioners constituted due process of law within the meaning of the Fourteenth Amendment? In other parts of the State where the strike existed arrests were being made and prisoners turned over to the State

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22 Sanner, J., in Ex parte McDonald (1914) 49 Mont. 454.

23 United States ex rel. McMaster v. Wolters (1920) 268 Fed. 69; United States ex rel. Seymour v. Fischer (1922) 280 Fed. 208.

24 United States ex rel. Palmer v. Adams (1928) 26 Fed. (2d) 141.

courts where, as the federal court was advised, they were being promptly acquitted or convicted.

The court made a number of remarks on the subject of "martial law" which, though obiter, are of interest. "If the governor had declared martial law, we would have an entirely different situation. All the rules applicable thereto, which the court and others are bound to recognize, would come into play. We would know how to proceed, how far the functions of the court and civil authorities were abrogated." And again, "I am not saying that the facts would not justify the governor in declaring martial law, or that he could be called to account if he so declared." From this it might be inferred that, by saying the words "martial law," the governor could have changed matters, and by his mere *ipse dixit* have brought about a totally different legal situation. To admit this would be to tear down the argument the court is building up. And passages from *Ex parte* Milligan which the court cites with approval are a refutation of the thesis that the judiciary is bound by the executive's declaration in this matter.

May this Palmer case be distinguished from those of Boyle, Moyer, and McDonald? First, a matter of form. In the instant case the governor sent the militia into action under an executive order directed to the adjutant general. It is the general practice, and in fact a course enjoined upon the President in such cases, to make a formal proclamation attested by the secretary of state declaring the existence of an insurrection, with a command that the insurgents disperse. How much significance was to be attributed to this irregularity the court did not say. More important was the fact that the return to the writ of habeas corpus did not set forth facts to indicate the necessity for the arrest and detention. So

far as the court was informed there were no charges against Palmer:

> The return does not set forth a single fact to enlighten this court as to conditions that formerly or now exist in the two counties in question. It simply alleges that in the exercise of honest judgment the governor deems it for the best interests of the community, and the preservation of law and order, to detain the petitioners without filing charges, admitting them to bail, or intent to submit them to a military or the local court for hearing and trial. . . . It is not stated what the insurrection or the cause of it is.

This point is important. Through the history of similar cases there constantly recurs the question, who is to judge the necessity of the action which the executive has taken? The answer always amounts to this:

> The power to declare a portion of a state to be in insurrection, and to suppress the same, from its nature must be exercised by the executive. . . . The extent of the power is alone the subject of judicial determination.[25]

When the executive fails or is unable to satisfy the court of the evident necessity for the extraordinary measures it has taken, it can hardly expect the court to assume it on faith.[26]

The state appealed from Judge Symes' decision, and in the circuit court of appeals the question was declared to have become moot, it being conceded that the violence and tumult had long since ceased.[27] The circuit court of appeals gave no inkling as to its own view. It stated the case of the appellants and that of the appellees and con-

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25 Ex parte Moore (1870) 64 N. C. 802.
26 Ex parte Lavinder (1921) 88 W. Va. 713.
27 (1928) 29 Fed. (2d) 541.

cluded: "To those desiring to examine the merits of these opposing contentions the following citations will be of interest."

It would seem to follow from the foregoing that preventive detention for a reasonable period is regarded by the courts as a legitimate means of coping with an insurrection, and that in the exercise of judicial discretion a writ of habeas corpus may not be allowed if it would interfere with the governor in the performance of his duty to suppress insurrection. But this does not mean that the privilege of the writ is suspended or that the courts are even temporarily ousted. The power of detention rests rather upon the judicial construction than on the express words of constitutional and statute law; its exercise is therefore dependent upon judicial toleration.

§ 45. Other Measures for Suppressing Insurrection. Overruling considerations of public emergency may justify acts which, under normal considerations, would be tortious.[28] It is conceded that a commander of the militia called out to restore order is vested with as much authority as a police officer.[29] In particular it would seem that he may arrest without warrant one whom he has reasonable cause to believe has committed a felony, even though no felony was in fact committed.[30]

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28 Maleverer v. Spinke (1538) 1 Dyer, 35b, 36b; Mostyn v. Fabrigas (1775) 20 How. St. Tr. 81; Gov. etc. of British Cast Plate Manufacturers v. Meredith (1792) 4 Durn. and East 794; Meeker v. Van Rensselaer (1836) 15 Wendell (N. Y.) 396; Russell v. Mayor (1845) 2 Denio (N. Y.) 461.

29 Franks v. Smith (1911) 142 Ky. 232, approved in Fluke v. Canton (1912) 31 Okla. 718; Ex parte McDonald (1914) 49 Mont. 454; Orr v. Burleson (1926) 214 Ala. 257; Manley v. State (1911) 137 S. W. 1137; State v. Coit, 8 Ohio Dec. 62; Mo. Rev. Stats. 1919, § 7374.

30 Orr v. Burleson *supra;* Franks v. Smith, *supra.*

One of the ordinary incidents of the employment of military power to restore order is the promulgation of regulations for the government of the civil population. Not many cases on this point come before the courts, for if arrest without warrant and preventive detention are upheld, *a fortiori* would the courts sustain milder measures of control. Saloons have frequently been closed and arms seized, and under some circumstances these may be regarded as necessary measures of prevention.[31] In Franks v. Smith[32] the Kentucky national guard had been summoned to restore order; apprehending that "night riders" might pass down a road, the commander had posted a patrol to halt and question everyone passing at night. The court found that for some weeks there had been no violence or disorder in the locality. The plaintiff, halted while traveling on an innocent errand and detained several hours, was allowed to recover damages in the sum of $1,000. A similar view was taken in Bishop v. Vandercook,[33] where a militia officer, called out to enforce a State prohibition law, had obstructed the Dixie Highway and caused the overturning of an automobile.

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31 By Texas Acts, 1905, p. 167, § 80, a commander is authorized to forbid the sale of liquor, arms, ammunition, and explosives when the militia is called to active duty to enforce the law.

After the regime of martial rule in West Virginia the Attorney General advised that the right to confiscate rifles was "very doubtful," and advised that they be returned. Report and Opinions, 1913–14, 150. The State license tax on saloons was returned for the period during which saloons had been closed by military order. *Ibid.*, 1915–16, 167; Acts of W. Va. 1915, c. 4, § 64.

An unreasonable exercise of military power will expose the commander to damages. O'Shee v. Stafford (1908) 122 La. 444; Herlihy v. Donohue (1916) 52 Mont. 601, discussed *infra*, p. 230.

32 (1911) 142 Ky. 232.

33 (1924) 228 Mich. 299.

In the Kentucky case cited above the Supreme Court considered with great care the extent to which military officers might go in suppressing insurrection. There were two extreme views, each of which was rejected. One held that the soldier should be treated as a private citizen, with no greater authority to make an arrest, suppress disorder, or prevent crime. This was too strict. The other view was that the military force might take any action which the commander thought necessary, and for so doing were not civilly or criminally responsible. After reviewing the statutory powers of police officers, the court concluded:

> Under the common law and these various statutes the military acting as peace officers would have the right to arrest any person who had committed a felony, or was committing in their presence an act that constituted a public offense under the statute or at common law, and the right to disperse, control, and suppress riots, routs, unlawful assemblies or bodies of men acting in concert for the purpose of intimidating, threatening, alarming, disturbing, or injuring any person or molesting or destroying property, with all the means and force necessary to accomplish these ends. . . . This statement does not of course describe all the conditions under which the military acting as peace officers may make arrests or disperse disorderly or other gatherings. It is only intended in a general way to illustrate that when the militia is armed with the power and authority of peace officers, under the statute and at common law, there need be no apprehension that they cannot effectively control any situation demanding their presence. The militia of the state are in truth peace officers.

A man's life may be taken if there is no other way of preventing him from committing a felony. But it would show a lack of requisite care and prudence to fire upon

a mob which was giving way and was not at the moment menacing life or property.[34] A soldier might use his rifle against a citizen if necessary in self-defense, but not as a punishment for non-compliance with an order.[35] Taking life as a penalty after the felony had already been committed would be unjustified.[36]

Sometimes a larger scope is made out for militia called to active duty to restore order. Commonwealth v. Shortall[37] arose during a strike in the anthracite coal region of Pennsylvania. The police and the sheriff had been overpowered, and on the latter's appeal the governor had ordered out the national guard. Non-union men had been killed and it was apprehended that an attempt might be made to dynamite a house. A sentinel was posted with orders to shoot anyone who refused to halt on approaching the house at night. A man did approach, failed to halt after several challenges, and was shot and killed by the sentinel. The coroner's jury found that the killing was unjustified, and criminal proceedings were about to be instituted against the sentinel. The State Supreme Court granted a writ of habeas corpus and prevented the case from going to a jury. It held that under the circumstances the orders to the sentinel had been legal and that homicide committed without malice by a soldier in the performance of his supposed duty was excusable, unless it was manifestly beyond the soldier's authority or such as a man of ordinary understanding would have known to be illegal. The court was disposed to find the criteria by which to judge the acts of militiamen not in the common law applicable to police officers,

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34 Lorich v. New York (1920) 113 Misc. 409.
35 Manley v. State, *supra.*
36 State v. Coit, *supra.*
37 (1903) 206 Pa. St. 165.

but in the standards prevailing among soldiers in time of war:

> It is not infrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, it is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war.

In this regard, continued the court, the only difference between power in time of war and in time of insurrection was that in the former the soldier was liable only to his military superiors, while in the latter he would be accountable, after the exigency had passed, to the civil and criminal law.

The Supreme Court of West Virginia went even farther, for it not only applied the standards of war as the criteria of military action in time of industrial strife, but held further that no judicial question was presented by the action of the governor and his military subordinates in exercising these war powers—in this case the suppression of a newspaper which was opposing the governor's policies.[38]

The language of the Pennsylvania court in the Shortall case has been criticised.[39] Certainly it was broader than the case at hand required. The justification for acts otherwise tortious and perhaps criminal must be found in the paramount duty of suppressing the insurrection.

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38 Hatfield v. Graham (1914) 73 W. Va. 759.

39 Franks v. Smith, *supra;* Bishop v. Vandercook, *supra.*

The power of the government must be commensurate with the exigency. But it seems unwise to set up in advance the rule that militia called out in time of insurrection may always assume the latitude appropriate to a state of war. There have been many insurrections in the American union, but not many that have approached a condition of war in the material sense. At the same time it may be that in some States the menace of domestic violence is such as to call for powers of preventive action somewhat greater than what is conceded to police officers. This possibility has been admitted by Professor Ballantine, whose studies on this subject certainly do not overstate the scope of military authority.[40] The militia are called after normal methods of enforcing the law have proved insufficient. This would seem to argue that where recourse to military action is chronic somewhat greater latitude should be allowed in restricting the exercise of private rights. This seems to be the view of the courts which regard preventive detention as an appropriate measure for suppressing rebellion.

§ 46. Military Control in the Field in Time of War. Where war prevails the scope of military control will be much greater. Property may be seized if necessary for the use of the forces [41] or to prevent its being captured or carried to the enemy; and the fact that the seizure is so imperfectly carried out that the property after all falls into the hands of the enemy makes the seizure no less justified.[42] Where a commander has adequate reason to

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40 Unconstitutional Claims of Military Authority, 24 Yale L. Journ. 189, 5 Journ. of the Amer. Inst. of Crim. Law and Criminology, 718.

41 Smith v. Brazelton (1870) 1 Heisk. (Tenn.) 44; Koonce v. Davis (1875) 72 N. C. 218.

42 Respublica v. Sparhawk (1788) 1 Dallas 357; Bronson v. Woolsey (1819) 17 Johns. (N. Y.) 46; McKrell v. Metcalfe (1866) 2 Duv. (Ky.) 533.

believe that a person is trafficking with the enemy he would be justified in arresting him.[43] Censorship of postal communications may be essential to the success of the military operations. Since this would be justified if necessary, a court would not interfere with such a measure.[44] But this doctrine is predicated upon good faith and necessity for the public service; it may not be extended to cover cases of wanton spoliation or of arbitrary control not requisite and proper under the circumstances.[45]

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[43] Clow v. Wright (1816) Brayton (Vt.) 118; McKrell v. Metcalfe, *supra*. But in Smith v. Shaw (1815) 12 Johns. (N. Y.) 257, the court allowed the plaintiff to recover $779.25 damages under the following circumstances: Shaw had been arrested by two military officers on the frontier between the United States and Canada and turned over to the provost marshal on several charges, including that of spying and of engaging in illicit trade with the enemy. Smith, the commanding officer at Sackett's Harbor, held Shaw for several days pending investigation, and then freed him. The conduct of the defendant did not appear to have been harsh or oppressive. It is believed that the court was entirely too severe in judging of the measures which a commander of an important frontier post is entitled to take in time of war; this was the view which Spencer, J., expressed in his dissenting opinion. In Skeen v. Monkeimer (1863) 21 Ind. 1, a deputy provost marshal, under military orders, had arrested and confined a civilian in Indiana on a charge of stealing a government animal; held, that the arrest was unwarranted, having regard to the peaceful locality where it was made. Holmes v. Sheridan (1870) Fed. Case No. 6644, was an action of trespass against General Sheridan. Held, by Dillon, J., that a general commanding an army in the Indian country might lawfully arrest a person therein who induced friendly Indians to steal cattle for him with a view to turning the cattle over to the government under an army contract.

[44] Morcom v. Postmaster General (1900) 21 Natal Law Rep. N. S. 32.

[45] Mitchell v. Harmony (1851) 13 How. 115; Despan v. Olney (1852) Fed. Case No. 3822; Farmer v. Lewis (1866) 1 Bush (Ky.) 66; Short v. Wilson (1866) *ibid.* 350; Beck v. Ingram (1866) *ibid.* 355; Terrill v. Rankin (1867) 2 Bush 453; Yost v. Stout (1867) 4 Cold. (Tenn.) 205; Wilson v. Franklin and Burleson (1869) 63 N. C. 259; Bryan v. Walker (1870) 64 N. C. 141.

At the time of the Civil War the courts of Kentucky did not regard it as a justifiable measure on the part of a commander to send free

Where the military authorities seize property for their use or control it is held that the owner is not divested of his title;[46] but the rightful capture during war of moveable property on land transfers the title to the government without judicial condemnation.[47]

Falling outside the domain of martial rule is the case of seizures made *durante bello* in the territory of the enemy.

§ 47. Government Control of Persons and Property in Time of War. The exigencies of a war may be such as to induce a government to institute a system of arbitrary control over persons and things generally, behind the lines as well as in the theater of operations. While the authority of the United States is paramount when

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Negroes across the Ohio River when their congestion at Louisville menaced the health of that city; nor was it regarded as a constitutional exercise of the war power for Congress to free the wives and children of slaves who volunteered. Corbin v. Marsh (1865) 2 Duv. 193; Jones v. Com. (1866) 1 Bush 34; Com. v. Palmer (1866) 2 Bush 570.

The availability of liquor at times of stress in war raises a special problem. Griffin v. Wilcox (1863) 21 Ind. 370 held that a commander at Indianapolis was not justified in forbidding retailers to sell liquor to the troops. In April, 1865, just before Richmond was evacuated by the Confederates and occupied by the Union forces, the city council ordered the destruction of all liquor, pledging the faith of the city to repay. In Jones v. Richmond (1868) 18 Grattan (Va.) 517, it was held that the city was liable on the contract, and, *semble,* would have been liable even if no contract had been expressed. Accord: Richmond v. Smith (1872) 15 Wall. 429, where the city pleaded specially that the liquor would in any case have been destroyed by a fire. In McLaughlin v. Green (1874) 50 Miss. 453, a commander, after surrendering at the close of the war, destroyed all the liquor in a city to prevent outrages by drunken soldiers released on parole. Held, that this was no justification in a suit to recover the value of the liquor.

[46] Williamson v. Russell (1872) 49 Mo. 185; Du Toit v. Marais (1903) 13 Cape Times Reports 139; Johnson v. Van der Walt (1903) *ibid.* 931; Report and Opinions, Atty. Gen. W. Va., 1913–14, 150.

[47] Young v. United States (1877) 97 U. S. 39; Cessna v. Thurman (1866) 1 Bush (Ky.) 292.

exercised as to subjects concerning which it has the power of control,[48] it is axiomatic that war does not suspend the constitutional guaranties.[49] There inheres in the executive a power, exercisable in case of extreme necessity, to appropriate private property for the public service. Such a taking raises an implied promise to make compensation. As Justice Clifford said for the Court in a Civil War case [50] where as an act of "imperative military necessity" certain river steamers at St. Louis had been impressed:

> Where . . . an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants [by impressment] to the extent of the immediate public exigency, but the public danger must be immediate, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed . . . Such a justification may be shown, and when shown the rule is well settled that the officer . . . is not a trespasser, and that the government is bound to make full compensation to the owner.

Where such an exigency did not exist, a commander who seized private property, even in good faith and under orders of the President, would be liable in tort.[51]

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48 White, C. J., in Northern Pac. Ry. Co. v. North Dakota (1919) 250 U. S. 135, 150.

49 Ex parte Milligan (1866) 4 Wall. 2; United States v. Cohen Grocery Co. (1921) 255 U. S. 81.

50 United States v. Russell (1871) 13 Wall. 623.

51 Little v. Barreme (1804) 2 Cranch 170; Mitchell v. Harmony (1851) 13 How. 115. This subject is discussed more fully *infra*, Art. 56.

When we come to the war powers of Congress, the test is not whether the measures were indispensable, but whether they were "necessary and proper," which means "appropriate" and implies the choice of means. Since the measures to be taken in waging war or suppressing insurrection are not defined, the decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are conferred by the Constitution.[52] The variety and extent of the means chosen in 1917–19 needs no recital here.[53] The significant point is the latitudinarian view which the Court took when various statutes were attacked.

Some foretaste of the attitude of the Court toward questions of national power in the face of an emergency was afforded in Wilson v. New.[54] Here the argument of necessity was invoked to justify an unprecedented interference with liberty and property—a fiat that for an indefinite period of time the railroads must pay for an eight-hour day the same wages as formerly paid for ten hours. The Chief Justice, speaking for a majority of the Court, blandly observed that

> although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

It is evident from the principal and the dissenting opinions that the justices realized that they were probing very close to the roots of the Milligan decision. If Congress could make such an enactment as was there in-

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52 Language of Swayne, J., in Stewart v. Kahn (1870) 11 Wall. 493, 506.

53 Berdahl, War Powers of the Executive in the United States.

54 (1917) 243 U. S. 332.

volved in the name of interstate commerce, what might not be justified in the name of national defence?

The war-time prohibition law,[55] enacted ten days after the armistice and effective July 1, 1919, did not, as in cases of requisition of property, provide for compensation. When this feature was attacked, the Court decided that, considering the time allowed for disposal, there had been no taking within the prohibition of the Fifth Amendment.[56] To the argument that the emergency had passed and that the purported exercise of a war power was unnecessary and void, the Court replied that a wide discretion must be allowed to Congress, especially in the exercise of a "power upon which the very life of the nation depends;"

> it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued.

That Congress might empower the Secretary of War to do everything deemed necessary to suppress houses of prostitution within such distance from any post or camp as he should think needful, seemed almost too obvious for statement.[57]

When in the Food Control Act [58] Congress went so far as to forbid "any unjust or unreasonable . . . charge in . . . dealing in . . . any necessities," it was held that there was no ascertainable standard of guilt and that the statute was therefore *ultra vires,* the war power notwithstanding.[59]

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55 40 Stat. 1045.

56 Hamilton v. Kentucky Distilleries Co. (1919) 251 U. S. 146.

57 McKinley v. United States (1919) 249 U. S. 397.

58 40 Stat. 276, amended by 41 Stat. 297.

59 United States v. Cohen Grocery Co. (1921) 255 U. S. 81.

In framing measures Congress would confer blanket authority upon the President, such as to assume control of the telephone lines whenever during the war he should deem it necessary for the national defence. In Dakota Central Telephone Co. v. South Dakota [60] the contention was that the President had exceeded his authority, in that conditions at the time he exercised his discretion were such that his decision amounted to an abuse of power and was *ultra vires*. The Chief Justice replied that this "at best concerns not a want of power, but a mere excess or abuse of discretion in exercising a power given," and concluded, "that it involves considerations which are beyond the reach of judicial power."

The same ground was gone over in Commercial Cable Co. v. Burleson,[61] where Mr. Hughes argued that the President's action in taking over the marine cables in November, 1918, was to a limited extent subject to judicial review, and was *ultra vires*. The test was whether there had been a tenable basis in the evidence from which a reasonable man could have reached the same conclusion. The district court held that the joint resolution had been within the powers of Congress, and that the President's decision was final. The power was not such a one that its exercise must be justified before the courts:

> Cases such as Mitchell v. Harmony and U. S. v. Russell [62] are quite different. There the power depended upon the common law, which imposed upon its exercise the condition that the emergency was actual. It became necessary to scrutinize the decision of the officer exercising the power, to ascertain whether it existed.

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60 (1919) 250 U. S. 163.

61 (1919) 255 Fed. 99; see also (1919) 250 U. S. 360.

62 *Supra*, p. 185.

That the war power of the United States is not to be restrained by any subtle emanation from the spirit of State rights is now evident. No one ever made the proposition plainer than that ex-Confederate, Edward Douglass White.[63] Yet the point is of enough interest to direct attention to an apposite case in the federal union of Australia.[64] The commonwealth government had been anxious to facilitate the export of wheat during the war, and at the same time to prevent scarcity prices at home. Under statutory authority it fixed the price of bread. This brought up the question whether such a measure was within the federal power to make laws with respect to naval and military defence, or was on the contrary *ultra vires* as an invasion of State rights. With McCulloch v. Maryland [65] as a point of departure and the two sets of Legal Tender Cases [66] to help along the argument, a majority of five justices had no difficulty in upholding the legislation as "necessary and proper" or, in terms of Australian constitutional law, "incidental to the execution of" the power of national defence. Two justices thought that such a measure, if desirable, should be taken by the several States.

In Great Britain the exigency of the war was much greater, and government control was in some respects more pervasive. The subjection of civilians to military control, which in America never got further than Senator Chamberlain's committee room, became an actuality in the United Kingdom. The similarity of the legal prob-

63 Northern Pac. Ry. Co. v. North Dakota (1919) 250 U. S. 135, 150. Note the fact that he dissented in Gilbert v. Minnesota (1920) 254 U. S. 325, 334, on the ground that no State might share the war power when Congress had occupied the whole field.

64 Farey v. Burvett (1916) 21 Commonwealth L. Rep. 433.

65 (1819) 4 Wheat. 316.

66 Knox v. Lee (1870) 12 Wall. 457; Juilliard v. Greenman (1884) 110 U. S. 421.

lems is such that the development of constitutional law in England is of instructive value in the United States.

The Crown may take measures either in purported exercise of inherent power known as the prerogative or in pursuance of statutory authority. It is conceded that in the exercise of the former only necessity will justify an interference with the rights of the subject. But necessity is relative and a matter of opinion, and the question is, by whose judgment and according to what criterion is the decision to be made. The problem is as old as the days of the Stuarts. In the Case of Ship Money[67] the Crown had asserted a right to levy an extraordinary tax for the purchase of war ships whenever the Crown deemed such a course necessary. John Hampden refused to pay the levy. In their arguments for Hampden, Holborne and Saint John admitted that in some circumstances the subject's property might be taken summarily for the defence of the realm; but they contended that the danger must be immediate and overpowering. Sir George Crooke, one of the minority of the justices who upheld Hampden's contention, said in his opinion:

> Royal power, I account, is to be used in cases of necessity, and imminent danger, where ordinary courses will not avail; . . . as in cases of rebellion, sudden invasion, and some other cases, where martial law may be used, and may not stay for legal proceedings. But in time of peace, and no extreme necessity, legal courses must be used, and not royal power.[68]

By a majority of one, the judges sustained the pretention of the Crown. Of their number was Lord Chief Justice Sir John Finch, who said in part:

> Now, whether a danger be to all the kingdom, or to a part, they are alike perilous, and all ought to be

67 (1637) 3 How. St. Tr. 825.

68 At 1162.

> charged [*i. e.*, charged ship money]. The king may charge the subjects for the defense of the land. Now the land and the sea make but one intire kingdom, and there is but one lord of both, and the king is bound to defend both. Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it will be too late, it may be. . . . His [*i. e.*, the King's] averment of the danger is not traversable, it must be binding when he perceives and says there is a danger; as in 1588, the enemy had been upon us, if it had not been foreseen, and provided for, before it came.[69]

An act of Parliament in 1640 [70] overruled the majority opinion in Hampden's case, and it was to be supposed that the course of the development of constitutional liberty had laid to rest the exaggerated notion that the Crown was the sole judge as to the existence of a danger which would justify a seizure of the subject's property. Yet for a time during the World War the royal prerogative seemed to be taking on new life. In the Shoreham Aerodrome case,[71] it was decided by Avory, J., and affirmed by the Court of Appeal that the Crown represented by competent military authorities had the power in time of war by virtue of the royal prerogative to take possession of land for the defence of the realm without making compensation. The occasion for the assertion of such a right was the occupation of a piece of land along the coast, for the maintenance of a flying field. The decision was based upon the supposed analogy to the classic example of entering upon the subject's land to throw up bulwarks against an invading enemy.[72] The Crown was

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69 At 1234.

70 16 Chas. I, c. 14.

71 In re A Petition of Right [1915] 3 K. B. 649.

72 As suggested in the resolution of the judges in the Saltpetre Case (1606) 12 Rep. 12.

at all times ready to give compensation *ex gratia,* and the case was compromised before the decision of the House of Lords might be had. Then there was the dictum of Lord Parker in The Zamora [73] to the effect that

> the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. . . . Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

Whatever development in constitutional law these cases presaged was rudely checked by the decision of the House of Lords in De Keyser's Royal Hotel v. The King.[74] The case was to determine whether a subject was entitled to compensation as of right where the Crown took over a London hotel to house the headquarters personnel of the Royal Flying Corps. Peterson, J., considered that the case was on all fours with the Shoreham case. On appeal it was held by Swinfen Eady, M. R., and Warrington, L. J., (Duke, L. J., dissenting) that a distinction must be drawn between the taking of land for the actual defence of a coast threatened with invasion and the taking of a building for purely administrative purposes. This difference was considered sufficient to lead to a decision opposite to that given by the same court in the Shoreham case. The House of Lords was of course not bound by

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[73] [1916] 2 A. C. 77 at 106.

[74] (1918) 34 T. L. R. 329; [1919] 2 Ch. 197; [1920] A. C. 508.

anything that had been said about the prerogative in the courts below. Their lordships were not disposed to make the case turn on the distinction between actual military and merely administrative uses. They held that the Crown had no power to take uncompensated possession of the suppliant's premises in right of its prerogative and that the statutes contemplated compensation. Having regard to the language used by their Lordships, the Shoreham decision, "although not expressly overruled . . . , cannot now be considered as binding." [75]

In concluding his opinion in the De Keyser case Lord Sumner sought to delimit the power of the Crown to requisition the property of the subject. Rightly or wrongly, the Shoreham case had been assumed to be analogous to the case of raising bulwarks. He continued:

> The statement [in that case] that no Court ought, in time of war, to require of the officers of the Crown proof (ex hypothesi public proof) of the reasons of State, which had led them to hold that in a particular case a certain course should be taken, seems to me to be an obvious statement. It is not in conflict with what seems to me to be an equally obvious proposition—namely, that when the Court can see from the character and circumstances of the requisition itself that the case cannot be one of imminent danger, it is free to inquire whether the conditions, resting on necessity, which were held to exist in the *Shoreham Case* are applicable to the case in hand. . . . Unless the Court has such power, the mere fact that the competent military authority honestly believed that what he demanded was needed for the defense of the realm, would . . . enable everything to be taken and nothing paid. Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency

75 Scott and Hildesley, The Case of Requisition, 70.

> extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case;* but there is a difference between things belonging to urgency, in which the law arms Crown and subject alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown.[76]

Analogous and in practice more important is the problem of fixing boundaries to the exercise of administrative discretion under some broad statutory grant of power. The King v. Halliday [77] is a case in point. The Defence of the Realm Consolidated Act of 1914 conferred upon the King in Council, during the continuance of the war, power "to issue regulations for securing the public safety and the defence of the realm." Pursuant to this broad grant regulations were issued, one of which, No. 14B, empowered the Secretary of State to order the internment of any person "of hostile origin and associations," where, on the recommendation of a competent military or naval authority, it appeared to him expedient for securing the public safety and the defence of the realm. Under this authority an order was issued to intern a naturalized British subject of German birth. The action of the executive was challenged in the courts but was upheld. The court held that the regulation was authorized by the statute; and the decision made by the executive pursuant to the regulations was conclusive upon the court. That the power thus conceded to the Crown might be abused was admittedly possible. The decision of the House of Lords did not, however, amount

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[76] [1920] A. C. at 565.

[77] "Zadig's case" [1917] A. C. 260, affirming [1916] 1 K. B. 738.

to a complete abdication of judicial control. Lord Atkinson pointed out that under the statute the power to issue regulations was exercisable only during the war and only for the purpose of securing the public safety and the defence of the realm.

> It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises.[78]

If the power were abused, said Lord Dunedin, a speedy repeal of the statute might be expected. In a dissenting opinion Lord Shaw of Dunfermline argued that the action of the government was *ultra vires*. The true meaning of the statute was that the King in Council was authorized to frame regulations of conduct for violation of which the subject might be punished by the courts.

In 1915 the High Court of Australia, overruling the Supreme Court of Victoria, held in interpreting a statute and regulations similar to those in Halliday's case that a naturalized citizen might be detained in custody if the Minister for Defence had reason to believe him to be disloyal; the sole condition for exercising this authority was the minister's belief, and as to whether that belief was well founded the courts could not inquire.[79]

The doctrine of Halliday's case was applied in The King v. Governor of Wormwood Scrubbs Prison [80] where in January, 1920, the Chief Secretary for Ireland had

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78 At 272.

79 Lloyd v. Wallach (1915) 20 Commonwealth L. Rep. 299.

80 [1920] 2 K. B. 305.

ordered the arrest of one suspected of disloyalty in Ireland. On habeas corpus proceedings it was contended that the special military emergency had passed and that the power of detention was no longer exercisable. To this the Earl of Reading, L. C. J., replied:

> When once the Court is satisfied that the proclamation was validly issued and that the war is still continuing, it has no power to interfere or to consider whether or not circumstances exist which justify the continuance of the proclamation.

This broaches a question such as that raised in America by exertions of the war power at a time when the armistice had long since been signed though a state of war persisted. While it is clear that war power is not limited to winning victories in the field,[81] it is by no means impossible that a measure at one time proper might become *ultra vires* by reason of the passing of the emergency.

The conclusion drawn from reviewing the decisions on the Dora statutes is that where a regulation was of a character which would, in ordinary circumstances, fall within the statutory objects and purposes, the courts would not inquire into the basis for the executive's decision. But where a regulation was of such a nature that the judges thought it obviously not for the public safety or the defence of the realm, they held it *ultra vires*.[82]

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81 Stewart v. Kahn (1870) 11 Wall. 493, 507.

82 This is the conclusion of Scott and Hildesley, *op. cit.*, 101–2—a work indispensable to an understanding of this matter.

In Chester v. Bateson [1920] 1 K. B. 829, the court held *ultra vires* a regulation forbidding the subject to take legal proceedings to recover possession of a dwelling ocupied by a munition worker unless the consent of the Minister of Munitions was secured. In Newcastle Breweries v. The King [1920] 1 K. B. 854 the same fate befell a regulation purporting to deprive the subject of a judicial determination of the amount due for requisitioned goods.

CHAPTER X

THE TRIBUNALS OF MARTIAL RULE

A trial by martial "law" is a purely executive act. J. H. Morgan, Professor of Constitutional Law in the University of London, in 14 Encyc. Brit. (14th ed.) 984.

§ 48. **The Nature of a Military Commission.** "Military commission" is the cognomen now firmly attached in American practice to the boards of military officers set up during periods of martial rule or military government. This tribunal is carefully to be distinguished from the court-martial, which enforces military law within the army. Courts-martial are authorized by statute, and their procedure and the code which they enforce are prescribed in the articles of war and the Manual for Courts-Martial. In contrast, a military commission generally has no higher origin than an order of the general, and has no definite code by which it must be governed. In the British Army it was long the custom to apply the name court-martial to military tribunals indiscriminately. But since the Boer War "military court" has come to be the accepted name for the "martial law" tribunal.

A military commission forms no part of the judicial system. Its proceedings cannot be reviewed by certiorari;[1] a case tried before it is not, properly speaking, a

[1] Ex parte Vallandigham (1863) 1 Wall. 243. Clement L. Vallandigham, a Congressman from Ohio, had been tried by military commission

"criminal cause;"[2] in short, to regard it as a court of justice is "quite illusory."[3] Its proceedings "derive their sole authority from the existence of actual rebellion,[4] and the duty of doing whatever may be necessary to quell it, and to restore peace and order."[5]

Sir James Fitzjames Stephen accurately described the tribunals of martial rule when he observed that they

> are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War. On the other hand, if they do so proceed, they are not protected by them as the members of a real court-martial might be, except so far as such proceedings are evidence of good

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sitting in Cincinnati, on charges of publicly expressing sympathy with the Confederacy. He was convicted and sentenced to imprisonment for the duration of the war. In Ex parte Vallandigham, (1863) Fed. Case No. 16,816, the federal circuit court for the S. Dist. of Ohio held that the proceedings were justifiable on the ground of military necessity, and refused a writ of habeas corpus.

Counsel for Vallandigham then sought to have the proceedings of the military commission reviewed by the Supreme Court, and to that end petitioned for a writ of certiorari to be directed to the Judge Advocate General to send up the proceedings. In an opinion delivered on February 15, 1864, the Court held that a military commission was not a "court" and that there was no jurisdiction to review its proceedings on writ of certiorari. 1 Wall. 243.

So the Vallandigham case differed from that of Milligan in the nature of the remedy sought. If in the former case the Supreme Court had been asked to review the decision of the circuit court on writ of error, then perhaps the whole question of trial by military commission in loyal States would have had to be decided. By the time the Milligan case came on the war was over. 65 L. R. A. 202.

[2] In re Clifford and O'Sullivan [1921] 2 A. C. 570.

[3] Lord Halsbury, in Tilonko v. Atty. Gen. [1907] A. C. 93, 95.

[4] Or war.

[5] The King v. Allen [1921] 2 Irish Rep. 241.

> faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War.[6]

Sir James Mackintosh said of trial by martial law that

> It is nothing more than a sort of better-regulated decimation, founded upon choice, instead of chance, in order to provide for the safety of the conquerors without the horrors of undistinguished slaughter.[7]

§ 49. The Proceedings of a Military Commission. Military commissions are set up in much the same fashion as a court-martial and are thus composed of officers who are acquainted with military law. From choice they turn to that code as a guide for their conduct. But there is no obligation to do so.[8] There are no requisite formalities, the omissions of which would entitle the accused to an acquittal.[9] It is even immaterial whether a written record is made of the proceedings, so far as the validity of a sentence is concerned.[10] Members of such a tribunal should, of course, "act in accordance with the principles of justice, honor, humanity, and the laws and usages of war."[11] They should give the prisoner every reasonable facility for making his defence and should avoid un-

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6 Hist. Crim. Law, I, 216.

7 Speaking in the Demerara debate, 11 Hansard's Parl. Deb. N. S. 1048.

8 Dig. of Opin. J. A. G. (to 1901. McClure, ed.) 452.

9 Lord Sumner, 154 L. T. 381; The King v. Maj. Gen. Strickland [1921] 2 Irish Rep. 317.

10 Atty. Gen. v. Van Reenen [1904] A. C. 114, 119.

11 Dig. of Opin. J. A. G. (to 1901. McClure, ed.) 452.

necessary severity. It is desirable that the record should be reviewed by higher authority before the sentence is carried into effect.[12] Failure to abide by these injunctions would not cause the sentence to be set aside, though in an extensive regime of martial rule there might be a reference of the proceedings to a judge advocate who might advise the commander to disapprove them. What the civil law does require of those who administer punishment under martial rule has thus been stated:[13] that in all cases there should be a grave and serious examination into the conduct of the accused; every act should evince an intent to discover guilt or innocence, not to inflict torture. By examination the judge did not mean such a trial as was then going on before the jury in his court, but the best examination which the nature of the case and the existing circumstances would allow. In the trial of Governor Wall for the inhuman punishment of a mutineer Lord Chief Baron MacDonald said that in the presence of a danger which might alarm the strongest mind, it would not be proper that rigor in matters of form be required; what the law did demand was that the procedure adopted for the trial show a genuine intention of acting for the best interest of the public; that as good a tribunal as the circumstances permitted be convened; that the accused have a reasonable notice of the charges and an opporunity to answer in his own defense.[14]

§ 50. **The Jurisdiction of Military Commissions.** Military commissions have no jurisdiction of civil suits.[15]

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12 Rules prescribed by the Colonial Office after the excesses of the Jamaica Rebellion had shocked England. 79 Parl. Papers (1906) Cmd. No. 2905, App. I, 55 ff.

13 Wright v. Fitzgerald (1799) 27 St. Tr. 759, 765.

14 (1802) 28 St. Tr. 51, 143.

15 40 Cyc. 391 note; Davis, Treatise on Military Law, 3d ed., 311;

They may take cognizance of two sorts of cases: (1) offences against the laws of war and the safety of the army and of the state, and (2) civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally.[16] It often happens that the ordinary courts of first instance are requested by the military authority to continue their functions. This arrangement enables the military commission to punish the offences of the first category above, while persons charged with the ordinary crimes and misdemeanors are not deprived of the benefits of a civil trial.

No hard and fast rule can be laid down as to the limitation of the jurisdiction of a military commission with respect to the time when or place where an offence was committed. It is quite likely that the first cases brought before a commission would be those very offences which gave rise to martial rule. If such a measure were reasonably necessary, it would be legal. Where the presence of an enemy has effectively closed the courts and the military is the only power left on the scene, it is held that the military tribunal may take jurisdiction of civil offences committed during the war prior to the initiation of martial rule, but not yet brought to trial.[17] But when the civil courts are by express designation or in fact left to function under martial rule, the military commission ought not to take jurisdiction of civil crimes.[18] In Gov-

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State v. Stillman (1870) 7 Cold. (Tenn.) 341; Walt v. Thomasson (1872) 10 Heisk. (Tenn.) 151.

16 Dig. of Opin. J. A. G. (to 1901. McClure, ed.) 464.

17 *Ibid.*, 464.

18 *Ibid.*, 466, *A fortiori*, a military commission could not be convened to try Indians for thefts, robberies, and murders committed by them upon incursions into Texas where the Indians were mere raiders with whose tribe, as such, the United States was not at war. But in 1873 it was held that Modoc Indians might be tried by military commission for the treacherous killing of an enemy during a truce. *Ibid.*, 466.

ernor Eyre's case much was made of the fact that he had caused a subject to be apprehended in a place not proclaimed to be under "martial law" and brought into the proclaimed zone, there to be tried. But Justice Blackburn held that such an act might be justified if the object had been to try the accused more quickly with a view to stopping more effectively the progress of the insurrection.[19] In Ex parte Jones [20] it was said that the military authorities would be justified in bringing within the proclaimed zone for detention all persons who should give aid and comfort to the insurgents; on the legality of punishing by military commission persons whose offences were committed outside the "area of war" the court reserved its opinion.

It is often the case that the offence charged is no crime at all—for example, possessing a book on "Night Fighting" [21] or personating scouts by means of false passes [22] or violating "martial law regulations." [23] Or it may be that the gravity of the offence is increased by the fact that it is committed in time of war—as for instance being improperly in the possession of ammunition [24] or of a revolver,[25] or stealing military horses during a seige.[26] It is now well understood that a military commission is not obliged to confine its sentences within the maximum limits fixed by statute law for the offence in question.

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19 Finlason's Rep., 83 ff.

20 (1913) 71 W. Va. 367.

21 The King v. Allen [1921] 2 Irish Rep. 241.

22 Umbilini v. General Officer Commanding (1900) 21 N. S. Natal Law Rep. 169.

23 Atty. Gen. v. Van Reenen [1904] A. C. 114.

24 Egan v. Macready [1921] 1 Irish Rep. 265; King (Johnstone) v. O'Sullivan [1923] 2 Irish Rep. 13.

25 The King v. Allen [1921] 2 Irish Rep. 241.

26 Jacobs v. General Officer Commanding (1900) 21 N. S. Natal Law Rep. 157.

The question has been much discussed whether a civil court can accept the express or tacit invitation of the military commander to continue to exercise under his protection and control all or a portion of its normal jurisdiction after "martial law" has been proclaimed. The question came up during the Boer War and was thus answered by Justice Maasdorp:[27]

> There is abundant authority for saying that there is nothing to prevent the military, while administering martial law, from allowing the Courts of law to take cognizance of matters which do not clash or conflict with the proceedings of courts martial. The existence of such civil Courts is no proof that martial law has become unnecessary.

An American case on this point is In re State ex rel. Barataria Land Company [28] where the facts were as follows: The governor of Louisiana had declared that a state of insurrection existed in a designated parish, and that "martial law" should obtain therein; but it was distinctly stated that the machinery of civil government would be allowed to continue until it interfered with the execution of military orders. The judge of the district took notice of the presence of the troops before the court house, and held that he could not properly proceed with the hearing of cases. On mandamus proceedings the State Supreme Court held that the governor's interpretation of his own proclamation and the disclaimer of any intention to interfere with the district court made the question a moot one. In a similar situation in Illinois it was held that the governor's proclamation did not suspend the civil authorities.[29]

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27 Queen v. Bekker (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 340.
28 (1915) 138 La. 428.
29 County of Christian v. Merrigan (1901) 191 Ill. 484.

Carefully to be distinguished from the military commissions discussed in this chapter are committees of a purely advisory character sometimes created to investigate cases and suggest reductions in the rigors which invariably attend martial rule.[30]

§ 51. Effect of the Termination of Martial Rule Upon Sentences. There has been some speculation as to whether sentences imposed by military commission lapse with the termination of martial rule. In the Fourie case [31] the question was broached but left unanswered. Lord Halsbury thought it doubtful how far such sentences would be valid when the war or insurrection was over. He added that it was usual to confirm such sentences by statute.[32]

In the United States we have no such enactments: if the sentences imposed during martial rule continue to be valid, legislation to that effect would be useless; if the sentences lapse, such a statute would amount to a bill of attainder, and be unconstitutional. During the Civil War many sentences imposed by military commission were to run "till the end of the war," [33] so the problem may never have arisen. No doubt a strong case could be made against the prolongation of military punishment, on the ground that as the power to punish sprang from necessity, its effects should so far as possible cease with the restoration of peace.

It is believed that the better reason lies on the other side. Where the military authorities had a right to punish, the sentence was not unlawful when imposed. And

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30 As in Colorado in 1913–14, and in South Africa during the Boer War.

31 (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 173.

32 Laws of England, VI, 403 note; Tilonko v. Atty. Gen. of Natal [1907] A. C. 93.

33 Davis, Treatise on Military Law, 3d ed., 313 note.

if not then, why thereafter? An analogy, but not a parallel case, is to be found in New Orleans v. Steamship Company,[34] where the military government at New Orleans had in 1865 made a lease of certain city property for ten years. It was contended that the restoration of normal political conditions terminated the lease. The court held that the lease had been "a fair and reasonable exercise of the authority" of the United States, and did not lapse when military government terminated.

In considering this question we are not wholly without judicial precedent. In United States ex rel. Seymour v. Fischer[35] a military commission had been set up at Nebraska City and had sentenced men to terms in jail. On habeas corpus proceedings the federal district judge held that the sentences had been lawful, and that "the establishment of peace" did not cause them to expire. But it is believed that under the circumstances this decision is a fragile authority. In West Virginia when the "wars" were over the governor pardoned those who had been sentenced to the penitentiary by military commission. And there are generally cogent reasons why the pardoning power should be used in such cases, in order that reconciliation of political differences may be advanced.

Colonel Winthrop was of opinion that the status of martial rule should be preserved with respect to trials pending until findings and sentences might be finally acted upon.[36] But agreeably to the Milligan decision, trial by military commission under martial rule would become illegal the instant the emergency ceased. In principle this would seem correct, and on grounds of policy most expedient.

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34 (1874) 20 Wall. 387.

35 (1922) 280 Fed. 208.

36 Military Law, 2d ed., II, 1306–7.

CHAPTER XI

TERMINATING MARTIAL RULE; LIABILITY AND INDEMNITY

> That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it.
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> Justice Miller in Mitchell v. Clark (1884) 110 U. S. 633, 640.

§ 52. Terminating Martial Rule. Since the law commits to the judgment of the executive the power to recognize the existence of a state of insurrection, it follows that its termination is to be fixed by the same authority.[1] As to the termination of war the courts will be bound by the decision of the political branches of the government.[2]

The power to wage war carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its progress.[3] Pursuant to this power and to the guaranty clause in Article IV of the Constitution, military govern-

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1 Barcelon v. Baker (1905) 5 Philippine 87.

2 The Protector (1871) 12 Wall. 700; United States v. 129 Packages (1862) Fed. Case No. 15,941; Willoughby, Const. Law, 2d ed., III, § 1029.

3 The language of Swayne, J., in Stewart v. Kahn (1870) 11 Wall. 493, 507.

ment was maintained for some time after the Civil War in States whose inhabitants were not in full enjoyment of constitutional protection.

Quite different is the situation of localities which have not put themselves beyond the pale. Martial rule does not linger until the political branches of the government terminate it by some formal act. It ceases to be lawful with the passing of the emergency; and of this the courts will be the judge.[4] Magoon correctly stated the distinction:

> A military government since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.[5]

§ 53. **Acts of Indemnity in the British Empire.** In the British Empire an act of indemnity is the customary finale to a regime of martial rule. For while parliamentary assemblies have generally failed to provide in advance for departures from constitutional regularity, they have seldom been niggardly in the matter of indemnification of those who have had to take upon themselves the responsibility for saving the state. Such a measure, said Chief Justice Innes [6]

> is manifestly required after every exercise of Martial Law powers. For though there are many acts which when done in defence of the State, would be protected

4 As they were in Ireland in 1924, The King (O'Brien) v. Military Governor [1924] 2 Irish Rep. 32.

5 Reports on the Law of Civil Government in Territory Subject to Military Occupation . . . , 12.

6 In Krohn v. Minister for Defence, South African Rep. [1915] App. Div. 191, 197–8.

> by the common law—as when a General in the field kills those in arms against the Government, seizes property or restricts liberty in furtherance of his actual operations—still there are many others which though performed reasonably, and in good faith, fall outside the protection of the law.

This is the position of Professor Dicey [7] and of Baty and Morgan,[8] who hold that the common law will justify only measures of "obvious necessity." Sir Frederick Pollock was a partisan of a less strict view:[9] during a public danger an officer, magistrate, or even a private citizen may lawfully do any act which, though prima facie a tort, he can prove to the satisfaction of a judge and jury was done for the public service, in good faith, and for reasonable and probable cause. Dicey dubbed this the doctrine of political expediency. If Sir Frederick Pollock was right, why pass an act of indemnity? For such a statute will be so construed as not to cover acts of bad faith,[10] and what was done for good motives would be condoned. Sir Frederick answered that such a statute was unnecessary but prudent to avoid vexatious suits. Dicey thought this did not give enough importance to an act of indemnity. The answer to this debate must remain hidden. For in practice a bill of indemnity is always brought in and passed, and whether this be from necessity or out of abundant caution none can say. Certainly there are likely to be rather high-handed acts during martial rule whose propriety it would be difficult to measure by any yard-stick known to the judiciary. In Mostyn v. Fabrigas [11] Lord Mansfield asserted that a governor

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7 Law of the Const., 8th ed., App. X.

8 War . . . , 22.

9 18 L. Q. R. 162.

10 Wright v. Fitzgerald (1799) 27 St. Tr. 759.

11 (1775) 1 Cowp. 161, 173–4.

might under some circumstances be legally justified in deporting individuals; but the ministers in South Africa did not care to put this dictum to the test when they deported the strike leaders in 1914. At the very least a bill of indemnity provides a ready and sufficient answer in cases where any other defence might be made out only with some difficulty.

§ 54. Acts of Indemnity in the United States. In the United States an act of indemnity encounters special constitutional hazards, and in practice is less common. The problem may be considerably narrowed by noting three propositions. First, the legislature may grant a complete indemnity for criminal acts. Just as it may extend an amnesty to rebels, so it may pass an act of oblivion to wipe out the criminality of acts done in suppressing rebellion. The state may forego the vindication due to its offended laws.[12] Second, in so far as an officer acts in pursuance of a law, the law itself in his authority and justification for measures not in excess. From this it is not a far step to the conclusion that that which the legislature might have authorized in advance and justified in anticipation, it may subsequently ratify and legalize.[13]

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12 The point was stated clearly by Tilghman, C. J., in Com. v. Duane (1809) 1 Binney (Pa.) 601, 608–9.

13 Mitchell v. Clark (1884) 110 U. S. 633; Miller, J., in Clark v. Dick (1870) Fed. Case No. 2818. In Tiaco v. Forbes (1913) 228 U. S. 549, the governor-general of the Philippines had without statutory authority deported an alien. Suit for damages was brought. Three weeks later the Philippine Legislature approved and declared legal the action of the executive. Speaking for the Supreme Court, Holmes, J., said: "The first doubt that naturally would occur is whether if a right of action had vested previously it could be taken away by such a statute. But it generally is recognized that in cases like the present, where an act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act. The person who has assumed to represent the will and

It remains to consider whether the legislature may deny remedies, or deny the right of action itself, in civil cases arising out of acts done in the suppression of rebellion.

By act of March 3, 1863,[14] as amended on May 11, 1866,[15] Congress "undoubtedly intended to afford an absolute defence, as far as it had power to do so" in all cases where "in defence of the life of the nation" officers had committed acts "for which no authority of law could be found, though the purpose was good and the act a necessity."[16] Section 4 of the original statute purported to negative any right of action for any act done under authority of the President in suppressing the rebellion.[17] The scope of section 7 was less sweeping, merely imposing a limit of two years after which no action might be brought for any trespass or wrong done, or act omitted under authority of the President or Congress during the rebellion.[18] The law of 1863 further provided that the

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person of the superior power is given the benefit of the representation if it turns out that his assumption was correct." And see United States v. Heinszen and Co., (1907) 206 U. S. 370, where it was held that the commencement of a suit to recover duties illegally collected did not prevent Congress from ratifying the act of the officers making the collection.

14 12 Stat. 755.

15 14 Stat. 46.

16 Miller, J., in Mitchell v. Clark, *supra*.

17 "*And be it further enacted,* That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue."

The amendment of May 11 extended the benefit of this defence to acts done or omitted under order, written or verbal, issued by the Secretary of War or by any military officer commanding a department, district, or place.

18 "*And be it further enacted,* That no suit or prosecution, civil or

cases in question might be removed into a federal court, and so much of the act was held to be constitutional in Mayor v. Cooper.[19]

The import and constitutionality of this federal bill of indemnity may best be studied by examining several cases arising in Missouri out of alleged trespasses committed pursuant to military authority. The situation was complicated by the fact that another defence was afforded by an ordinance of indemnity incorporated in the Missouri constitution in 1865.[20] The inquiry begins with Drehman v. Stifel.[21] In June 1861, during a period of commotion among federal and southern sympathizers in St. Louis, the defendant, Colonel Stifel, under ex-

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criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done; *Provided,* That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred from his remedy by suit or prosecution until two years from and after the passage of this act.''

19 (1867) 6 Wall. 247.

20 ''No person shall be prosecuted in any civil action or criminal proceeding for or on account of any act by him done, performed or executed after the first day of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States or that of this state, to do such act, or in pursuance of orders received by him or them from any person vested with such authority; and if any action or proceeding be brought or instituted against any person for the doing of any such act, the defendant may plead in bar thereof and give this ordinance in evidence. The provisions of this section shall apply in all cases where suits are now pending in the same manner and with like effect as in suits or actions hereafter brought.'' Mo. Gen. Stats. 1866, p. 48.

21 (1867) 41 Mo. 184.

press orders from the general in command, occupied a certain piece of ground as his regimental parade ground and for other military purposes. Before the end of the year the lot was evacuated. Without reoccupying the premises, the lessee waited until September, 1863, when he brought an action of forcible entry and detainer against Stifel, and recovered damages. Stifel appealed. In the mean time (1865) the constitutional ordinance of indemnity already noted came into effect. So when in 1866 the appeal came on to be heard in the State circuit court, Stifel relied upon it as a defence. The appellee contended that the provision was void under the federal Constitution. From a judgment for Stifel an appeal was taken to the State supreme court. That the indemnity ordinance was not a bill of attainder or an *ex post facto* law within the federal prohibition [22] was clear. The court observed that even without any indemnity Stifel's verdict might stand upon common law principles. Mitchell v. Harmony,[23] relied upon by the plaintiff, had held that where there was no pressing danger a military officer would be liable for taking private property. But here, considering the situation in St. Louis at the time, and the finding of several officers who had inspected the premises before Stifel had been ordered to take possession, it might well be that a justification could be made out. "A sagacious military commander is apt to see necessities that are not apparent to everybody." Under these circumstances "the clearest proofs of the want of lawful authority, of an arbitrary abuse of power, and a plain perversion of military orders to malicious purposes, or selfish ends, ought to be demanded" from the plaintiff.

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22 As interpreted in Calder v. Bull (1798) 3 Dallas 386.

23 (1851) 13 How. 115, discussed *infra*, p. 228.

Stifel was, moreover, afforded ample protection by the indemnity provision of the State constitution:

> Now the only effect that need be given to the ordinance, in order to make it cover the case, and justify the instructions which were given for the defendant [in the trial court], is this: that when the military authority and orders are made to appear, the existence of the emergency or military necessity shall be deemed to be conclusively proved and established by the judgment of the officer, and shall be presumed as a matter of law. It operates so far to change the rules of evidence. It makes a justification and a defence which would not have been such before without further proof. In this it is not unlike those statutes which make certain facts proven to have the effect to raise a conclusive presumption of negligence or liability. The military necessity only is thus conclusively presumed, but the question whether the military authority or orders existed in fact, or whether the acts complained of were really done by virtue of such authority, or were the acts of the individual in his private capacity, or were an abuse of power or a perversion of orders for private ends or malicious purposes, would be still open for determination by the jury. The evidence thus far makes a change in the law as it stood before, but we do not think it is for this reason unconstitutional.

The court pointed out that this did not leave the plaintiff wholly without a remedy:

> His right of property in the lease was not taken away . . . For this use of his lot, as well as for the value of the property destroyed, he was entitled to look to the Government for compensation.

The judgment for Stifel was affirmed.[24]

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[24] The facts of the case are complicated by the consideration that in 1860 Drehman's lessor had sold the fee of the premises to Stifel, and

The case was brought to the federal Supreme Court on writ of error, where it was held that the indemnity provision of the Missouri constitution did not constitute a bill of attainder or an impairment of the obligation of a contract.[25]

Both the federal statute of limitations and the State indemnity ordinance were invoked in another St. Louis case heard before the federal circuit court, Justice Miller presiding.[26] The alleged trespasses were compulsory assessments made under order of General Schofield, in 1862. In his opinion Justice Miller anticipated much that he was later to write for the Supreme Court in Mitchell v. Clark.[27] A valid defence to the action was to be found in the State indemnity ordinance. Moreover, the action was barred by section 7 of the Congressional indemnity act, which was declared to be constitutional. The Missouri ordinance had been challenged as a depri-

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it appears that the latter had been anxious to purchase the lease. It was contended that Stifel had used his military office to get possession of the lot from his lessee. On the other hand, Drehman failed to take possession of the lot when the troops were removed, and preferred to treat the whole proceeding as an individual trespass. He waited for almost two years and then sued Stifel to recover double damages as provided by statute. The supreme court thought this conduct "not a little remarkable," and no doubt upheld Stifel's defence the more readily since substantial justice was done thereby.

25 (1869) 8 Wall. 595. Drehman's contention was this: By the original lease, the lessor covenanted to keep Drehman in lawful possession of the premises; this became obligatory upon Stifel; the law of landlord and tenant existing when the lease was executed became a part of the contract; one of the remedies by which Drehman was entitled to enforce his right was the proceeding by forcible entry and detainer; since the ordinance of indemnity was invoked by Drehman's lessor, the ordinance impaired the obligation of the contract. The Supreme Court replied that the remedy was not a part of the contract and might have been repealed at any time by the legislature.

26 Clark v. Dick (1870) Fed. Case No. 2818.

27 (1884) 110 U. S. 633.

vation of a right of action and therefore of property without due process of law, and therefore in violation of the *Fifth* Amendment. To this Justice Miller replied that even "if we could see our way clear to hold that a right to sue for a personal trespass was property within the meaning of that amendment," still the argument would not be advanced, as the Fifth Amendment limited only the federal government. The newly adopted Fourteenth Amendment was not discussed by the court.[28]

In State v. Gatzweiler[29] the State ordinance of indemnity was invoked by a sheriff in an action on his official bond. There had been a sale of the plaintiff's property in execution on a judgment, and a sum of money had remained in the hands of the defendant (sheriff) after the execution was satisfied. This balance the sheriff had paid over to the provost marshal at St. Louis, in part satisfaction of a fine which a military commission had imposed on the plaintiff. The State court held that the sheriff's bond had the force of a contract that he would not fail upon any account to make the payment due to the plaintiff. In so far as the State ordinance of indemnity released him from this liability, even where the fund was misapplied in pursuance of military orders, the obligation of a contract had been impaired. So in this case the State constitutional provision was repugnant to the federal Constitution. But the federal statute of limita-

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28 It will be recalled that the potentialities of the due process clause were not realized at once. In the Slaughter House Cases (1873) 16 Wall. 36, Justice Miller expressed a doubt whether the provision would ever be applied save in cases of race discrimination. Considering the tenacity of his devotion to the Union, it is likely that Miller would have repelled the contention that an amendment won at so much cost in war could first be invoked to deprive a patriot of a defence for acts done in suppressing the rebellion.

29 (1871) 49 Mo. 17.

tions had also been invoked. The plaintiff's cause of action accrued and the two-year limitation began to run from the time the fact of the collection had been made to appear by the return of the execution satisfied. More than two years had elapsed before suit was instituted, and so section 7 of the act of March 3, 1863, was an effectual bar to its prosecution.

The latest of the Missouri cases was Mitchell v. Clark, where the facts were as follows. The suit was for the rent due on certain buildings in St. Louis for three months in the year 1862. The defendant (tenant) answered that the payment had been made for and on account of the plaintiff to the provost marshal, by order of General Schofield then in command, as a necessary means of carrying on the war. The defendant pleaded the federal statute of limitations, section 7 of the act of March 3, 1863. The Supreme Court of Missouri held the plea insufficient.[30] No justification could be made on common law grounds, as no overwhelming necessity was shown. The federal act of indemnity, in so far as it purported to annul rights of action, was unconstitutional. And being so, the statute of limitations was declared to be inoperative. The judgment for the defendant was reversed, and the cause remanded. In the court below judgment was rendered for the plaintiff, and the defendant appealed.[31] This time the court had to pass upon the defence afforded by the State ordinance of indemnity. In a brief opinion the court held that portion of the State constitution to be invalid.[32] At last the case was brought on writ of

30 (1877) 64 Mo. 564.

31 (1879) 69 Mo. 627.

32 The reason is not wholly clear: whether the indemnity was repugnant to the Fourteenth Amendment, or to the new State constitution of 1875; or whether, as seems more likely from the tone of the opinion in 64 Mo. 564, on the ground that even a constitutional provision might

error to the Supreme Court of the United States, where the judgment of the State court was reversed.[33] Considering that an act of Congress was held to afford a defence in a case of spoliation done in a loyal State, this decision calls for scrutiny. The reasoning of the majority, speaking through Justice Miller, ran as follows: an action in which a defence under an act of Congress is set up involves a federal question and may be removed from a State to a federal court; therefore Congress may prescribe a statute of limitation for it in the federal court; but if in that court, then in all courts, as otherwise there would be two rules of limitation of actions in different courts holding plea of the same cause.

Other considerations weighed with the majority:

> The act complained of is done for the benefit of the government by one of its officers, or by his imperative orders, which could not be resisted. If done under a necessity or a mistake, the government should not see him suffer. In such a case as the present, where the money collected went into the military chest, and was either turned over to the treasury or used to pay the military expenses of the United States, the government is bound in equity, if not legally, to repay the defendant, if judgment goes against him, what it received, with interest and costs. It has a right to say in such cases that the suit, which is to establish this liability, must be brought within reasonable time in whatever court it is brought, and to determine what is that reasonable time. The government which thus exposes its officers and others, acting under its compulsory exercise of power, to be sued, while not denying redress for the illegal exercise of such power, must have the au-

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be invalid as contrary to "general law," the right of property, and "the genius, nature, and spirit" of our government.

33 (1884) 110 U. S. 633.

> thority to require that suits brought for such redress shall be commenced within reasonable time.

The court observed that no provision of the federal Constitution prohibited Congress from impairing the obligation of contracts. But even with regard to the States, which are limited by the contract clause,

> it has been repeatedly held that a statute of limitation which reduces materially the time within which suit may be commenced, though passed after the contract was made, is not void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right.
>
> Such is the case before us, for the statute leaves two years . . . within which suit could be brought.

Justice Field dissented, expressing a characteristic view of the sanctity of vested rights:

> I know of no law that was ever enacted in the United States, which would justify a military officer in enforcing the payment to him of a debt due from one loyal citizen to another loyal citizen, neither being in the military service, or residing in a State declared to be in insurrection, or in which the courts were not open and in the peaceful exercise of their jurisdiction. . . .
>
> . . . Neither the President nor Congress can confer immunity for acts committed in violation of the rights of citizens.
>
> Congress may provide for indemnifying those who, in great emergencies, acting under pressing necessities for the public, invade private rights in support of the authority of the government; but between acts of indemnity in such cases, and the attempt to deprive the citizen of his right to compensation for wrongs committed against him or his property, or to enforce contract obligations, there is a wide difference, which cannot be disregarded without a plain violation of the Constitution.

Strictly construed, the decision does no more than to uphold section 7 of the act of March 3, 1863, that is, the statute of limitations. Whether section 4, purporting to deny all right of action, was also constitutional, it was not necessary to decide. Certainly the Court did not go out of its way to cast any aspersions on the statute as a whole. Major Birkhimer was of opinion the the language of the Court upheld the act "by the strongest implication."[34] Willoughby[35] and Hare[36] also construe the language to have some such import, and are outspoken in their criticism. Judge Advocate General G. N. Lieber however was of the opinion that

> there is absolutely nothing in this language to indicate that in the opinion of the Supreme Court Congress could do more than by a retrospective law legalize what it might have legalized in the first instance.[37]

It is believed that the only proposition which the decision will support is that Congress may fix a reasonable limitation upon the time within which an individual may seek his remedy for alleged wrongs done by officers under color of federal authority in defence of the nation. Other propositions which may be inferred from the opinion are not regarded as settled law.

The highest court of West Virginia definitely upheld an act of indemnity which annulled rights of action in civil cases. By act of February 22, 1866, the legislature declared that

> No suit or action shall be maintained in the courts of this State, against any person for any act done in the suppression of the late rebellion; and it shall be a suffi-

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34 Military Govt. and Martial Law, 3d ed., 578.
35 Const. Law, 2d ed., III, 1611.
36 Amer. Const. Law, II, 981.
37 163 No. Amer. Rev. 549, 557.

> cient defence to such suit or action to show that such act was done in obedience to the orders, or by the authority of any civil or military officer of this State, or of the reorganized government of Virginia, or the government of the United States; or that said act was done in aid of the purposes and policy of said authorities, in retarding, checking and suppressing the late rebellion.

The objectionable character of this statute, especially of the last clause, would seem apparent. But it was unhesitatingly applied in a case where it was set up as a defence in an action for the seizure of eight barrels of whiskey, which the defendants alleged to have taken under orders of a federal military officer.[38] The Supreme court quoted at length from the opinion of the Missouri court in Drehman v. Stifel, and then dismissed the subject by saying that the act of indemnity was an "incident to the right of self-defence" and was not repugnant to the constitution.[39]

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[38] Hess v. Johnson (1869) 3 W. Va. 645.

[39] As a later court pointed out (in Peerce v. Kitzmiller (1882) 19 W. Va. 564, 571) the supreme court of appeals which rendered this decision was clearly wrong in its attitude toward controversies arising out of the war. See also Pierce v. Carskadon (1872) 16 Wall. 234, a test oath case. While upholding the sweeping act of indemnity quoted above, it visited retribution upon the heads of ex-Confederates by holding that for them the plea of belligerent rights was of no avail. Numerous cases in 2, 3, and 4 W. Va., cited in 19 W. Va. at 571. This attitude was clearly erroneous. See Freeland v. Williams (1889) 131 U. S. 405; Dow v. Johnson (1879) 100 U. S. 158; Price v. Poynter (1866) 1 Bush (Ky.) 387; Smith v. Brazelton (1870) 1 Heisk. (Tenn.) 44; Broadway v. Rhem (1874) 71 N. C. 195. Eventually the doctrine was overruled in Carskadon v. Williams (1873) 7 W. Va. 1. The State constitution of 1872 established belligerent rights exercised according to the usages of civilized warfare as a defence for ex-Confederates as well as Union men. Const. 1872, Art. VIII, § 35. Then the question arose whether this provision could be given retrospective effect, or whether, on the contrary, rights had vested in admittedly erroneous judgments previously rendered but as yet unexecuted. It was held that a bill in equity to invalidate such

Another State court sometimes cited as upholding an act of indemnity cutting off rights of action in civil cases is the supreme court of North Carolina. In 1866 the general assembly passed an Amnesty Act, providing that no person in the service of the State or Confederate or Union governments should be liable in any civil action "for any act done in the discharge of any duties imposed upon him by any law or authority purporting to be a law." [40] After expressing some doubt,[41] the court upheld the statute in an action brought by a recusant conscript against his captors for the value of certain personal effects taken from him at the time of his capture.[42] The court started from the very dubious premise that after North Carolina was restored to the Union, "every one who had during the war been concerned in arresting . . . a recusant conscript . . . was liable to indictment, for assault and battery, and was liable to be sued for the arrest and false imprisonment." It was to prevent such suits that the amnesty was deemed necessary. As the court concluded, the rebel governments had existed *de facto,* and their laws had been the "law of the land." "The scope and effect of the Amnesty Act is to make a recognition of this fact, by the rightful government afterwards established, and to give validity to the legislation of the late *de facto* governments." This result is as it should be. The statute bars suits only in case of acts done under lawful authority, and is thus far different from the indemnity laws noted above.

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a judgment and enjoin its enforcement was "due process of law." Freeland v. Williams (1889) 131 U. S. 405; and see Peerce v. Kitzmiller (1882) 19 W. Va. 564 and White v. Crump and Shanklin (1882) 19 *ibid.* 583.

40 Public Laws, 1866–67, c. 3, § 4.

41 In Bryan v. Walker (1870) 64 N. C. 141.

42 Franklin v. Vannoy (1872) 66 N. C. 145.

In two actions for false imprisonment by federal officers during the Civil War, section 4 of the Congressional act of indemnity was set up as a defence, and it was held by the supreme courts of Indiana and Illinois respectively that that section, in so far as it purported to deny redress through civil actions, was unconstitutional.[43] The Illinois court said:

> That it is the duty of congress to indemnify out of the public treasury any person who has been compelled to pay damages for an act performed by him in good faith, under the command of the president, for the purpose of suppressing the rebellion, is a proposition few persons would deny. But the denial by congress, through a retrospective law, of all redress to a person whose property or liberty was illegally taken under a military order, is a mode of discharging obligations, which, however convenient, is not reconcilable with the principles of the constitution.

The supreme court of Kentucky suggested that section 4 of the act of March 3, 1863, might be "manifestly void"[44] and held that the State amnesty law of February 28, 1867,[45] was unconstitutional in so far as it denied civil remedies for private wrongs—the facts of the case being that a Confederate officer under a superior's orders had carried away the money found in the vault of a bank.[46]

These cases have been discussed at some length because it is believed that they clearly refute the statement[47] that "the weight of authority is to the effect that a statute which provides that no one shall be liable in a

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43 Griffin v. Wilcox (1863) 21 Ind. 370; Johnson v. Jones (1867) 44 Ill. 142.

44 Eifort v. Bevins (1866) 1 Bush 460.

45 Acts of 1867, I, c. 1561.

46 Terrill v. Rankin (1867) 2 Bush 453.

47 In 12 Corpus Juris 973.

civil action for acts done prior thereto in obedience to military authority is not an interference with vested rights, and is constitutional." The highest court of West Virginia once held this view; the Supreme Court of the United States remained non-committal;[48] and the supreme courts of Illinois, Indiana, Kentucky, and Missouri held to the contrary. The North Carolina case cited is not strictly in point.[49] If the legislature concludes that it is sound policy to save officers unharmed from suits for damages, it may attain this end by making appropriations for their relief, but not, it is submitted, by annulling rights of action in civil cases.

§ 55. **Statutory Provisions Concerning the Liability of Officers and Soldiers.** The codes of a number of States lay down rules to define and limit the civil and criminal

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[48] For completeness the following federal cases are cited. In Bean v. Beckwith (1873) 18 Wall. 510 at 516, Field, J., referred to § 4 of the act of Mar. 3, 1863, and the amendment of May 11, 1866, and said for the Court: "Assuming for this case that these statutes are not liable to any constitutional objection, they do not change the rules of pleading;" so it was held that where an officer pleaded the order of the President to justify the arrest of one charged with disloyal practices, the text of the order must be set forth substantially and in traversable form. Section 4 of the act of Mar. 3, 1863, was assumed to be valid by Strong, Cir. Justice, in Crosby v. Cadwalder (1870) Fed. Case No. 3419, where an army officer set it up as a defence in a suit brought for damages growing out of the seizure of a ship and the arrest and confinement of her officers under orders of the Secretary of War. The section was declared to be constitutional in McCall v. McDowell (1867) Fed. Case No. 8673, and was regarded as unconstitutional in Milligan v. Hovey (1871) Fed. Case No. 9605.

[49] The cases above were selected because they grew out of acts of military or at any rate governmental authority during the Civil War. To the general effect that a legislature may not destroy an existing right of action which has accrued under the principles of the common law, numerous authorities might be cited. The following are suggested as valuable: Hunt v. Gulick (1827) 9 N. J. L. 205; Craig v. Fowler (1882) 59 Iowa 200; James v. Oakland Trac. Co. (1909) 10 Cal. A. 785, 103 Pac. 1082.

liability of soldiers called to active duty to restore domestic peace. Some provisions do no more than reenact the common law, while some go so far as to be of dubious constitutionality. A common provision is that militiamen "shall not be liable, civilly or criminally, for any act or acts done while in performance of their duties." [50] Several States provide that there shall be no liability for acts done "while on duty;" [51] in Mississippi the phrase is "in performance of their duty or in obedience to orders from superior officers." [52] In Montana the law purports to grant immunity from suit for any acts done "by virtue of any order which may hereafter be held invalid by any civil court," [53] while in Minnesota the exemption is limited to the acts of a soldier "done under lawful orders and in the performance of his duty." [54] When troops are called to aid the civil power in Massachusetts, they will not be liable either civilly or criminally for obeying an order unless it was "manifestly beyond the scope of the authority" of the one who gave it;[55] in Connecticut the statute goes so far as to provide that if any person resisting the laws of the State or unlawful-

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50 N. J. Comp. Stats. 1911, p. 3349. Similarly in Calif. Pol. Code 1920, § 1922; Neb. Comp. Stats. 1922, c. 34, § 3323; Utah Comp. Laws 1917, § 3836; similarly as to civil liability, Kans. Rev. Stats. 1923, c. 48, § 241.

51 N. Mex. Stats. 1915, § 3889; McKinney's Consol. Laws of N. Y., Bk. 35, § 14; Ore. Laws 1920, § 9653.

In McLaughlin v. Kipp (1903) 81 N. Y. Supp. 896, the appellate division of the supreme court implied grave doubts as to the validity of so sweeping a provision.

The same provision formerly appeared in the militia law in Louisiana. In O'Shee v. Stafford (1908) 122 La. 444, the court said that if it were intended to exempt superior officers from civil responsibility for torts, it would be a denial of due process of law.

52 Hemingway's Ann. Miss. Code 1927, § 6501.

53 Mont. Rev. Codes 1921, § 1347.

54 Mason's Minn. Stats. 1927, § 2426.

55 Gen. Laws 1921, c. 33, § 35.

ly or riotously assembled shall be killed or injured by the national guard, the soldiers "shall be discharged from all civil or criminal liability therefor," [56] while the Alabama code more properly makes an exception in cases where it can be made to appear that the killing or injury was "wanton or malicious, and without any seeming necessity or excuse." [57] In several States if the plaintiff loses his case the defendant may recover treble costs.

§ 56. Civil Liability of Commanding Officers. The rules governing the liability of officers and men are to be found not so much in the statutes as in the decisions of courts. The subject falls into several topics.[58]

Where an officer acts within a discretionary authority conferred by law, he is in nowise liable for bona fide errors in judgment. Dinsman v. Wilkes is a case in point. A marine sued his commanding officer in trespass for detaining him in the naval service (while on an expedition in the Pacific) after his enlistment had expired and for punishment administered. Bills of exceptions were taken in the course of two trials and on writ of error the case was twice brought before the Supreme Court. In the first review of the case the Court, speaking through Justice Woodbury, pointed out that a statute invested Captain Wilkes with power to detain the marine if the public interest required it, and continued:

> While an officer acts within the limits of that discretion, the same law which gives it to him will protect

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56 Gen. Stats. 1918, § 774.

57 Code 1928, § 4971.

58 The cases are too numerous to be abstracted here. Reference is made to the following annotations: Ann. Cas. 1917 C, 8 ff; L. R. A. 1915 A, 1141 ff; also to Brown, Military Orders as a Defense in Civil Courts, 8 Journ. of Amer. Inst. of Crim. Law and Criminology 190 and 3 Va. L. Reg. N. S. 641; J. H. Morgan, The Army and the Civil Power, 75 Nineteenth Century 973.

> him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption. . . .
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> When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used. . . .
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> . . . The justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his discretion, are to be presumed legal, till shown by others to be unjustifiable.[59]

A new trial was ordered and when the case came up again Chief Justice Taney said the same thing: the marine had not been entitled to his discharge;—

> But to guard against a misconstruction of this opinion, it is proper to say that the right to determine the question was, for the time being, in Captain Wilkes. In his position as commander, the law not only conferred upon him this power, but made it his duty to exercise it. . . . Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; . . . for any error in judgment in this respect, no action would lie against the defendant.

Regarding the punishment administered to the disobedient marine, the Chief Justice said in part:

> This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him [Wilkes]. For, in such a case he would be liable whatever his

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59 (1849) 7 How. 89, 130. A number of cases are cited.

> motives. But the fact to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

The case therefore turned upon Captain Wilkes' motives and this was a question for a jury, which must consider not only the severity of the punishment, but also the circumstances as they must have appeared to Captain Wilkes at the time.[60]

This familiar principle has been applied in three notable cases where a governor was sued for damages for measures which otherwise would have been tortious, but which under the circumstances were held to be proper incidents to the power to suppress insurrection.[61] The doctrine would seem to be predicated upon the governor's acting in good faith, and also upon the condition that the measures be appropriate to the lawful end. And it is believed to be a judicial function to determine, not whether the governor might more wisely have taken some other course, but whether the course he did take was not forbidden and was reasonably related to the fulfillment of his duties. In holding that the governor himself should fix the limits to his own powers the supreme court of West Virginia is believed to have fallen into error. The dissenting opinion of Justice Robinson is preferred:

> Certainly the Governor cannot be made to answer before the courts for acts within his political province.

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60 (1851) 12 How. 390.

61 Druecker v. Salomon (1867) 21 Wis. 621, discussed *supra*, p. 168; Moyer v. Peabody (1909) 212 U. S. 78, *supra*, p. 172; Hatfield v. Graham (1914) 73 W. Va. 759, *supra*, p. 181.

> But the declaration alleges that he committed acts wholly beyond his official powers. No Governor as such official can do a malicious act. On such a charge as the declaration contains the Governor is answerable before the trial court the same as any other citizen. The charge may there be shown to be untrue, or the act charged to be not malicious but justifiable. Still a competent trial court in which the charge is made has jurisdiction to determine whether the charge is true or the act justifiable.
>
> The unsound principle established by this decision permits a Governor to deal with private rights and private property as he pleases. He has only to answer that he does so officially, and an action, though alleging facts showing that his act is wholly without his political province, will be prohibited. Such a view is wholly un-American, and inconsistent with constitutional government. Reason and authority condemn it, and the administration of even-handed justice cries out against it.[62]

Whatever might have been the attitude of the judiciary toward military power in earlier periods, there is at present no reason to believe that if the judges delimit the frontiers in this region they will encroach unduly upon the executive's province.

Sometimes an officer will use life or property in a way unwarranted by the scope of his lawful powers. Here honest judgment will not suffice: the officer must be prepared to satisfy a jury that the emergency was so urgent as not to admit of normal courses. The leading case under this head is Mitchell v. Harmony.[63] Under sanction of the executive power of the United States, plaintiff Harmony had entered Mexico for the purpose of trade,

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[62] Hatfield v. Graham, *supra.*

[63] (1851) 13 How. 115. And see Bates v. Clarke (1877) 95 U. S. 204.

in the train of the American army then invading. Subsequently his goods were seized by Colonel Mitchell, second in command, pursuant to an order from the commanding officer. Harmony brought an action of trespass to recover, and the case reached the Supreme Court. The defendant set up as his defence the orders of his superior and the further contention that the seizure was made to prevent the goods from falling to the enemy. Chief Justice Taney discussed the liability of the defendant, saying in part:

> It is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common public good.

In McCall v. McDowell[64] the plaintiff had been arrested and detained in a military prison by order of General McDowell for publicly exulting over the death of President Lincoln. General McDowell rested on the act of Congress of March 3, 1863, authorizing the suspension of habeas corpus and the executive proclamation pursuant thereto under date of September 15, 1863. The act had carefully defined the persons to whom it applied. The category which came nearest to McCall was "aiders and abettors of the enemy." The executive proclamation had recited that the public safety required that the writ of habeas corpus be suspended in cases where by authority of the President officers held in custody

64 (1867) Fed. Case No. 8673.

aiders and abettors of the enemy. The district judge interpreted the act strictly to mean only persons held by actual order of the President—not that any officer, because under the orders of the President, had license to arrest on his own motion any person whom he might consider an aider or abettor. Only compensatory damages were allowed.

During the insurrection in Montana in 1914 the officer in command of the State troops ordered all saloons closed, later amending the order so as to allow them to be open only from 8 a. m. until 7 p. m. A saloonkeeper was believed to have offended in this regard, wherefor certain officers and men were ordered to take out his stock of liquor and destroy it. An action of trespass was brought to recover the actual value. The plaintiff won a judgment which was affirmed on appeal.[65] The attitude of the court appears from the following excerpt:

> That within the narrow limits of *actual and pressing necessity,* private property may be taken and destroyed for the public good, scarcely admits of debate. The most common illustration of this is the demolition of a building to prevent the spread of a conflagration. But in every instance where such a right has been exercised and questioned, the decision upholding the right makes it clear beyond controversy that only the most overriding necessity will justify or excuse the officer ordering such destruction.
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> It is not alleged that the rioters in Butte were threatening or about to break into Herlihy's saloon to obtain intoxicating liquors and that destruction of the stock was necessary to prevent the excesses which might reasonably be expected to follow the free access of disorderly disposed persons to the liquors. It is not pre-

65 Herlihy v. Donohue (1916) 52 Mont. 601.

tended that the arrest and imprisonment of Herlihy and the closing of his place of business during the insurrection would not have been equally efficacious as a means of preventing drunkenness, disorder or rioting. Under constitutional government such as ours, the destruction of private property without compensation to the owner must be the last resort, available only in the presence of imminent and overwhelming necessity which brooks no delay. In failing to allege facts sufficient to disclose such necessity, the answer fails to make out a justification for the trespass.

§ 57. **Civil Liability of Subordinates.** That a subordinate cannot escape the civil consequences of an illegal act by pleading the orders of a superior is a well known principle. In Little v. Barreme [66] the facts were thus. The Navy Department issued orders not authorized by law; in the execution of the orders Captain Little seized a vessel which was later released by a federal court. The question was whether damages should be allowed against the captain. In affirming a judgment for the plaintiff, Chief Justice Marshall said in part:

I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers. . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is

66 (1804) 2 Cranch 170.

> placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.

After Milligan had won his case in the Supreme Court he brought an action of trespass against General Hovey, by whose order he had been tried, and members of the military commission.[67] The defendants pleaded, *inter alia,* that they had acted under the authority of the President. In view of the uncertainty which had attended the Milligan case, it certainly could not be said that the arrest and trial had been palpably unlawful, or that the defendants would have dared to refuse obedience to the orders under which they acted. In the light of the Milligan decision, the court thought that section 4 of the Act of March 3, 1863, could not constitutionally afford a complete justification to the defendants. But as a statute of limitations it was applicable and destroyed the right of action for the greater part of Milligan's imprisonment; for the residue nominal damages were recovered.

It is evident that this rule will work a hardship on subordinates who from the nature of the military service are often not self-moved and have in general no oppor-

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67 Milligan v. Hovey (1871) Fed. Case No. 9605.

tunity to investigate the propriety of the orders they receive. There is a broad twilight zone between what is clearly lawful and what is clearly the reverse. The severity of the rule is somewhat modified. Where within his lawful authority an officer gives orders to his subordinates, they are not liable for obeying in good faith. Justice Curtis put the proposition thus:

> If he receives an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, and not the inferior, who reasonably supposed that he was doing his duty.[68]

This means that a subordinate does not have to read his senior's mind and guess at his peril whether the latter is exercising his lawful powers with rectitude or malice. But so far as tort cases are concerned this may not be very helpful, since it is difficult to tell with what authority the law invests a superior officer. At times imposing implications may be spun out of the word "law,"[69] while at other times it may be interpreted grudgingly. In Franks v. Smith,[70] it will be remembered, certain officers and men of the Kentucky National Guard were sued for detaining, under orders, a wayfarer who passed at night over a road in a district where an insurrection was being suppressed. The court quoted with approval the well-known remark of Justice Stephen that

> the only line that presents itself to my mind is that a soldier should be protected by orders for which he

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68 Despan v. Olney (1852) Fed. Case No. 3822.

69 Moyer v. Peabody (1909) 212 U. S. 78; In re Neagle (1890) 135 U. S. 1, 59.

70 (1911) 142 Ky. 232.

> might reasonably believe his officer to have good grounds.[71]

But the court concluded that the measures taken in this case had been "unreasonable and unlawful" and "indefensible," and affirmed a verdict of $1000 for detaining the plaintiff from night till morning.

Such a view is clearly irreconcilable with that of the Montana court in Herlihy v. Donohue, discussed above. There damages had been recovered from subordinate officers who destroyed the liquor as well as from the commander. In directing that the action against the subordinates be dismissed the court said

> If the order is one which the superior might lawfully make, the inferior cannot refuse obedience . . . If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse. . . .
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> In the present instance the order for the destruction of the property was one which Major Donohue might lawfully have made if the circumstances of the case warranted it, and since it was valid on its face, the subordinate officers could not refuse obedience. . . . They could rely upon its apparent validity and justify their acts in obeying it.

Where the commander and the subordinate are sued jointly, so that dismissing the action against the latter does not leave the plaintiff without redress, and especially where the subordinate is of very low rank and was only an obedient and passive participant in an act not patently unlawful, the court *may* hold that the superior's

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[71] Hist. Crim. Law, I, 206.

order is a justification.[72] But all that can be said with assurance is that good intentions will merely excuse from punitive damages.[73]

§ 58. **Criminal Liability.** When military orders are pleaded as a defence in criminal cases somewhat different considerations enter. For here intent becomes material.[74] Not that obedience to orders is in itself a justification for criminal acts; certainly it is not.[75] Nor is the soldier excused because he did not know the law. But he may establish the absence of criminal intent on the ground that the facts as he saw them justified his conduct. As the doctrine is stated in Bishop's Criminal Law:[76]

> the wrongful intent being the essence of every crime, it necessarily follows, that, whenever one is misled, without fault or carelessness, concerning facts; and, while so misled, acts as he would be justified in doing were they what he believes them to be; he is legally innocent. . . .

Lord Haldane in speaking of the position of a commander summoned by competent civil authority to put down

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72 Trammell v. Bassett (1866) 24 Ark. 499; McCall v. McDowell (1867) Fed. Case No. 8673.

73 Johnson v. Jones (1867) 44 Ill. 142 at 166; Dillon, J., in Carpenter v. Parker (1867) 23 Iowa 450; Milligan v. Hovey (1871) Fed. Case No. 9605; McLaughlin v. Green (1874) 50 Miss. 453 at 461; Rainsford v. Browne (1902) 2 New Irish Jurist Reports 179.

74 In re Lewis (1897) 83 Fed. 159.

75 Bishop, Crim. Law, 7th ed., I, § 355. This rule was applied notably in Com. v. Blodgett (1846) 12 Mete. (Mass.) 56, where members of a military force from Rhode Island were indicted for assault upon insurgents who had fled to Massachusetts. The governor of Rhode Island repudiated the invasion, and the order of their commander did not protect the soldiers.

76 § 303.

a disturbance, had this to say on the subject of criminal liability:

> He could not allege a mistake of law on his part but he could allege a mistake of fact, into which he had been *bona fide* led by the misjudgment and action of a Magistrate.[77]

Military subordinates may frequently have occasion to invoke this principle. They must obey without knowing all the whys and wherefores and may, as Hare said,[78] take an order as coming from one who is much better informed and more able to judge of its necessity than they. Where, especially under the circumstances of war or insurrection, the order is one which the commander might well be justified in giving, a junior who obeys in good faith will probably not have great difficulty in proving the absence of any intent to transgress the law.

Many of the cases on criminal liability arise out of situations where in obedience to orders or to his supposed duty as a sentinel or otherwise, a soldier has killed an individual. Three legal situations present themselves. The act may have been such that any man of ordinary understanding should have seen that it was illegal—as where a sentinel on duty in keeping back crowds during a visit of the President ran his bayonet through a man who endeavored to cross his post.[79] Here the criminal law will take its course. Or the purpose may be held to have been lawful and the act to have been done without needless severity. This was the view of the Pennsylvania court in the Shortall case[80] where, during an insurrec-

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77 In his testimony before the Select Committee on Employment of Military in Cases of Disturbances, 7 Parl. Papers (1908) No. 236, p. 12.

78 Amer. Const. Law, II, 920.

79 Manley v. State (1911) 62 Tex. Crim. 392, (1913) 69 Tex. Crim. 502.

80 (1903) 206 Pa. St. 165.

tion and under circumstances of special urgency, a sentinel shot a man who refused to halt in approaching a house being guarded against apprehended dynamiting. If it be necessary to suppress a mutiny or to prevent the escape of a prisoner, a member of the guard may take life without criminal liability.[81] Where a soldier must act in the face of sudden peril, the law will not expect him "to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required." These words are quoted from Judge (afterwards Associate Justice) Woods, who in a trial for homicide incident to suppressing a mutiny, further instructed the jury:

> The means used must be proportioned to the end to be accomplished. In order to determine whether the homicide, now under investigation, was lawful or unlawful, you should consider what, under the circumstances of the case, would appear to a reasonable man to be the demands of duty. Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into mutiny.[82]

There is a third situation where the action taken may itself have been illegal, but where the individual soldier was ordered to participate under such circumstances that he could not have known of the illegal end in view. Such

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81 Gov. Wall's Case (1802) 28 How. St. Tr. 51; United States v. Carr (1872) Fed. Case No. 14,732; United States v. Clark (1887) 31 Fed. 710; In re Fair (1900) 100 Fed. 149.

82 United States v. Carr, *supra*.

a case was Riggs v. State,[83] where a soldier was summoned by his captain to go on a scouting party. The patrol was marched to the home of a certain individual who when found was killed, without any justification so far as appears. From its inception the assembly may have had an unlawful purpose; but since it was not proved that the accused aided or abetted in the killing, his conviction in the trial court was reversed.

The soldier's dilemma has been much dwelt upon, and probably is more fancied than real. There need be little fear of criminal consequences where a subordinate in good faith obeys orders not patently illegal. In tort cases this is not so clear; the courts vary in their conclusions as to what sound public policy demands. In upholding a soldier who acted from good motives they may leave the plaintiff without redress. Often, as in Milligan's case, the wrong has fallen upon one who has forfeited public esteem. Probably in the long run justice is best served where actual damages are recovered and the defendant is reimbursed from the public treasury. This was the upshot of the suit of Harmony against Colonel Mitchell.[84] Especially where the wrong is attributable to the misjudgment or inexperience of the military agents whom the government has employed upon difficult duties, the blame should fall upon the public.

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83 (1866) 3 Cold. (Tenn.) 85. An extreme case is that of Queen v. Smith (1900) 17 Sup. Ct. Rep., Cape of Good Hope, 561, where a special court acquitted a soldier who in time of war and in obedience to orders which his captain meant as a threat, deliberately killed a farmer who was dilatory in obeying the captain's directions.

84 10 Stat. 727.

CHAPTER XII

CONCLUSION

> We want the Army to be a popular institution, and not a menace to civil liberty.
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> Lord Haldane, 7 Parl. Papers (1908) No. 236, p. 16.

§ 59. Martial Rule in Time of Domestic Disorder. While the precedents are far from consistent, and while in recent years we have come closer and closer to the point where in time of public danger the will of the executive is the law of the land, still it is believed that the following conclusions represent the mean of sound judicial opinion. The executive proclamation that an insurrection exists is conclusive. The situation may be met by military force, and the courts will uphold measures which are shown to have seemed necessary and proper at the moment. While some courts hold that the troops when so employed have only those powers with which peace officers are invested, others concede somewhat greater latitude. Qualified or preventive martial rule is the expression sometimes used to denote this regime. But the name is only a tag to identify a factual situation, and is not essential. Though the executive has a latitude commensurate with the emergency, the employment of troops during an insurrection does not unseat the courts nor abrogate judicial control over public officers. Nor is the situation altered if for good measure the governor proclaims that "martial law" shall prevail. As long ago as 1757 such a contention was repelled by the law officers

of the Crown, who declared that they did not "apprehend that by such proclamation of martial law, the ordinary course of law and justice is suspended or stopped, any further than is absolutely necessary to answer the . . . military service of the public and the exigencies of the province."[1] Some judges in the exercise of what they deem to be a sound discretion have refused a habeas corpus where civilians were detained pending the restoration of order. But the governor and his subordinates must be prepared to satisfy the courts of the necessity as well as the good faith on which their action is based. Punishment by military authority as distinguished from preventive measures is justifiable only in time of war. Insurrection and war are not synonymous, and agreeably to the federal Constitution, a governor may not exercise war powers during an insurrection.

We may turn from the authority of precedent and seek to evolve the wisest solution to a grave problem. This calls for a nice balancing of relative social values. On the one hand lies that consideration for the individual that has dictated our bills of rights—fundamental rules to guarantee civil liberty and insure fair play in the exercise of governmental power. Nor does this accrue solely to the profit of the individual: whatever the fate of its Debses and Moyers, society can ill afford to take short cuts toward the control of conduct merely because that conduct threatens to disturb the economic status quo. It is no doubt wise, as it is lawful, that in time of overpowering necessity executive process should serve as a temporary substitute for judicial process. But the executive should be sure that it is indeed a crisis, and not merely a hallucination.

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1 Forsyth, Cases and Opinions on Constitutional Law, 188.

There is a converse principle of policy: the public should not be exposed to the hazards of hair-breadth escapes merely to afford gratuitous opportunities to insurrectionists. It is not only a power but a duty of the governor to put down violence and enforce the law. To hit the precise line which necessity dictates may indeed be difficult. The very success of prompt action may belie the originally critical nature of the emergency. Officers may have to act summarily and cannot be required to weigh their measures with that scrupulous nicety which is to be expected in a court of law. Situations must be viewed as they appeared at the moment, not in the light of the event.

How much weight is to be attributed to each of these two factors will be answered differently by different individuals. To the solution of the eternal conflict between the authority of the state and the liberty of the individual we all bring our own confirmed attitudes and sentiments. It cannot be doubted that the conduct of martial rule has sometimes been reprehensible, characterized by ignorance, class consciousness, or antipathy toward striking workers. At the same time the forbearance of local officers frequently permits a disorder to get out of hand, so that the troops when called in have to deal with an aggravated situation. That orderly procedure of civil magistrates so often vaunted in discussing this question may have been a delusion. The controversy is not one between soldiers and civilians, though it has often been misrepresented so to be. The expressions of opinion coming from officers in the regular service have on the whole been notably temperate, while the clearest affirmations of the extreme authoritarian view are to be found in judicial decisions and in articles written by lawyers. The line of cleavage is between two political philosophies.

The uncertainty of the law invites regrettable consequences. Years ago Professor Ballantine proposed a State military code which was frankly an effort to strike a medium between conflicting views.[2] It invested military officers with somewhat greater powers than the common law accords to peace officers, but required that prisoners taken be brought before a committing magistrate within a day. It sought to establish just rules as to the liability of soldiers, and to prevent the national guard from being used in an unholy alliance with private detectives. At the same time the chief justice of the Union of South Africa in an utterance already quoted[3] expressed regret that statutory provision had not been made to govern the conduct of martial rule in that commonwealth. It is desirable that the legislature cope with the problem in the light of experience and with an eye to conditions imposed by the fundamental law. The present situation requires the judges to improvise rules *ex post facto*. Much of the legislation now on the statute books needs reexamination. Not even the extreme right wing of the friends of authority can take much comfort from an enactment which purports to exempt a soldier from liability for anything that he does while on active duty. For if it were relied upon it would almost certainly be held unconstitutional. With the experience now available it should be feasible to draft a code which would protect civilians and soldiers as well.

§ 60. **Martial Rule in Time of War.** The year 1866 may be taken as a datum line from which to measure developments in the law of martial rule, in the United States and in the British Empire. For at that moment

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2 14 Mich. Law Rev. 102, 197.

3 *Supra*, p. 126.

the Supreme Court was deciding the Milligan case and in England the courts were dealing with the various cases arising out of the Jamaica rebellion. Counsel for Milligan were catching the ear of the Court with the opinions of English constitutional authorities, while Englishmen picked up and echoed the argument of David Dudley Field. The Milligan decision remains. Some of the remarks contained therein should not be taken in an absolute sense, yet in essence the doctrine there expressed is generally believed to be sound. In contrast, judicial opinion in the British Empire has undergone profound modification. In America this is instructive; it may prove prophetic. For the British Empire the test of the courts being open or closed has now been abandoned. Gone too is the idea that the judiciary might exert its control over the measures a military commander takes *durante bello*. When and so long as war is found to exist at a given point, the hand of the judiciary is stayed. There remains parliamentary and popular control, and during the great war the former fell to an inferior place.

It would be a thankless task to attempt to lay down precise rules by which the government should be bound in the event of another national emergency. The dangers of mere domestic disorder are more nearly constant, and may be anticipated by the legislator. But the strain which war imposes on the fabric of the constitution is incalculable. Such conclusions as seem warranted have been set down.[4] The fundamental law must be interpreted so that the government is preserved, but also, as Justice Davis said, so that it is worth preserving. This means the retention so far as possible of the judicial administration of law. The point where this must give

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4 *Supra*, Art. 38.

way to executive control cannot be stated in a phrase. Any tendency needlessly to resort to martial rule may find its restraint in the courts, or in Congress, or in the necessity for securing popular consent to the conduct of the war. Or it may be as in the past that the moderation of the President will frustrate those who would improvidently establish punitive martial rule.

BIBLIOGRAPHICAL NOTE

While the material principally relied upon has been cited from time to time in the foot notes, the following references may be of value. Martial rule is discussed ably and at some length in Willoughby's *Constitutional Law,* 2d ed., III, c. 87, and in Hare's *American Constitutional Law,* II, cc. 41–4; also in Pomeroy, *Introduction to the Constitutional Law of the United States,* 10th ed., §§ 707–14. The opinion which Edward Livingston drew up for General Jackson is to be found in the *Correspondence of Andrew Jackson* (Bassett, ed.) II, 197. The Civil War elicited opinions from a number of jurists, among others: J. A. Campbell, Asst. Secy. of War in the Confederate government and ex-Associate Justice of the Supreme Court, *Records of the Rebellion,* s. 1, XVI, pt. 2, 979; B. R. Curtis, *Executive Power* (pam. Cambridge, 1862) 22 ff.; Tatlow Jackson, *Martial Law: What Is It? and Who Can Declare It?* (pam. Phila. 1862); Joel Parker, *Habeas Corpus and Martial Law,* in 93 No. Amer. Rev. 471, esp. 500 ff.; Theophilus Parsons, *Lecture on Martial Law,* in 3 West. Law Mo. 329 ff. On martial rule during the Civil War, see J. G. Randall, *Constitutional Problems Under Lincoln,* esp. cc. 6–9; *The Milligan Case* (Knopf, N. Y., 1929), edited by Samuel Klaus; A. H. Carpenter, *Military Government in Southern Territory,* in the Ann. Rep. of the Amer. Hist. Assn., 1900, I, 467–98; W. A. Dunning, *The Constitution of the United States in Civil War,* 1 Pol. Sci. Quart. 163–98; S. G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion,* 3 ibid. 454–88; Whiting, *War Powers Under the Constitution of the United States,* 43d ed. (Bost. and N. Y., 1871).

The law review articles vary in value and in point of view. Among those who would restrain the exercise of military power

within narrow limits the most notable contributions have been made by Professor H. W. Ballantine: *Qualified Martial Law,* 14 Mich. Law Rev. 102, 197, including a proposed military code; *Martial Law,* 12 Columb. Law Rev. 529; *Military Dictatorship in California and West Virginia,* 1 Calif. Law Rev. 413; *Unconstitutional Claims of Military Authority,* 24 Yale Law Journ. 189 and 5 Journ. of the Amer. Inst. of Crim. Law and Criminology 718; *The Effect of War on Constitutional Liberty,* 24 Case and Com. 3; *Limitations on the War Power,* 6 Calif. Law Rev. 134. Also Owen J. Roberts, *Some Observations on the Case of Private Wadsworth,* 42 Am. Law Reg. N. S. 63 and 161; E. J. Maxwell, in 66 Albany Law Journ. 270; G. H. Ethridge, 13 Constit. Rev. 159.

Among those who would concede greater latitude in the exercise of war powers or in the suppression of insurrection are Garrard Glenn, *The Army and the Law* (Columb. Univ. Press, 1918); G. F. Flood, *Martial Law and Its Effect Upon the Soldier's Liability to the Civilian,* 73 U. Pa. Law Rev. 380; H. P. Fletcher, *The Civilian and the War Power,* 2 Minn. Law Rev. 110; A. J. Lobb, *Civil Authority Versus Military,* 3 ibid. 105; R. S. Rankin, *The Constitutional Basis of Martial Law,* 13 Constit. Rev. 75. H. J. Hersey, formerly Deputy Atty. Gen. of Colo., published a brief on the *Power and Authority of Governor and Militia in Domestic Disturbances* in 19 [American] Law Notes 28, May 1915.

The extreme authoritarian viewpoint is to be found in G. S. Wallace, *The Need, Propriety and Basis of Martial Law,* 8 Journ. of the Amer. Inst. of Crim. Law and Criminology, 167 and 406. Also in F. Arnold, *The Rationale of Martial Law,* 15 A. B. A. Journ. 550; to which L. Maury makes a rejoinder, ibid. 721, telling some personal experiences of martial rule in Montana in 1914. Under the same head is an article on *What Is Martial Law?,* dealing with martial rule in Idaho in 1892, in 25 Chicago Legal News 86.

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